No. 323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased.

Respondent.

BRIEF OF RESPONDENT

FRANCIS P. KELLY,
CARL J. CHRISTIAN,
WILLIAM MEYER,
S. O. MEYER,
Butte, Montana,
Attorneys for Respondent.

SUBJECT INDEX

	Page
Argument	28
Discussion of Facts	3, 9
Discussion of Law	28
Evidence, Review of	3
Exceptions of Defendant to Instructions to Jury Were Not Taken in Presence of Jury	80
Facts, Statement of	3
Instructions Were Not Erroneous	45
Undisputed Facts, Statement of	3

TABLE OF CASES

	Page
Aetna Life Ins. Co. vs. Wharton, 63 Fed. (2d) 378	43
Agnew vs. United States, 165 U. S. 36	58
Alabama & V. Ry. Co. vs. Crome, 52 So. 703	79
American Central Life Ins. Co. vs. Alexander, (Tex.), 39 S. W. (2d) 86	38
American Surety Co. vs. Bankers Sav. & Loan Assn., 67 Fed. (2d) 803	43
Anderson vs. Border, 87 Mont. 4, 285 Pc. 174	43
Ariosi vs. Orient Ins. Co., 50 Fed. (2d) 548	64
Arnold vs. Genzberger, 31 Pac. (2d) 296, 96 Mont. 358	68
Atlantic Coast Line vs. Ford, 287 U. S. 502, 77 L. Ed. 457	52
Barber's Estate, Re, 63 Conn. 393, 22 L. R. A. 90	79
Baugham vs. N. Y. P. & N. Ry. Co., 241 U. S. 237, 60 L. Ed. 977	45
Black vs. Southern Pacific Co., 12 Pac. (2d) 981	73
Bodkin vs. Edwards, 265 Fed. 621	42
Bubany vs. New York Life Ins. Co., 51 Pac. (2d) 864	80
Carlson vs. Npr. Pac. Ry. Co., 86 Mont. 78, 281 Pac. 913	43
Chesapeake & D. Ry. Co. vs. Mears, 70 Fed. (2d) 490	42

TABLE OF CASES—Continued

	Page
Chesbrough vs. Woodworth, 244 U. S. 72; 61 L. Ed. 1000	45
Chicago R. I. & P. Ry. Co. vs. Collins Products Co., 249 U. S. 186	45
City of Seattle vs. Puget Sound Power & Lt. Co. 15 Fed. (2d) 794	42
Clairborne-Reno Co. vs. Du Pont Co., 77 Fed. (2d) 565	42
Connecticut General Life Ins. Co. vs. Maher, 70 Fed. (2d) 441	37, 40, 67, 76
Conquerer, The, 166 U. S. 110	28
Del Vecchio vs. Brewers, 296 U. S. 280, 80 L. Ed. 229	55
Dent vs. National Life Ins. Co. (Tex.), 6 S. W. (2d) 195	38
East Tennessee Co. vs. Interstate Commerce Comm., 181 U. S. 1	57
El Paso & S. W. R. Co. vs. Vizard, 211 U. S. 608, 53 L. Ed. 348	45
Fidelity Co. vs. Weise, 55 N. E. 540, 182 Ill. 496	66
Fidelity & Casualty Co. vs. Driver, 79 Fed. (2d) 713	62, 63
Fidelity & Casualty Co. vs. Lowenstein, 97 Fed. 19	80
Fidelity & Casualty Co. vs. Pittinger, 63 Fed. (2d) 880	30
Freeman vs. Smith, 62 Fed. (2d) 291	42
Gamer: New York Life Ins. Co. vs., 76 Fed. (2d) 543	16, 32, 42, 82
Gamer: New York Life Ins. Co. vs., 90 Fed. (2d) 817	43, 51, 57, 82
Gayton vs. Pacific Fruit Express, 15 Pac. (2d) 217	74
General Motors Acceptance Corp. vs. Chevrolet Co. 74 Fed. (2d) 368	42
Gillilan vs. Portland Cremation Assn., 120 Ore. 286, 249 Pac. 627	74
Gilman vs. Philadelphia . . . 3 Wall. 713	80
Grantham vs. Ordway, 40 Ca. App. 758, 182 Pac. 73	74

TABLE OF CASES—Continued

	Page
Gray vs. Fred B. Neuhoff Co., 12 Pac. (2d) 1036	74
Graybill vs. Con. Assn., 60 Pac. (2d) 167	74
Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720	29
Hansen v. Oregon-Wash. Ry. & Nav. Co., 97 Ore. 190, 188 Pac. 963	77
Heiner vs. Donnan, 285 U. S. 312, 76 L. Ed. 772	54, 60
Home Benefit Assn. vs. Sargent, 142 U. S. 691	30, 33, 48, 80
Holt vs. United States, 218 U. S. 245	58
Jefferson Standard Life Ins. Co. vs. Clemmer, 79 Fed. (2d) 724	57
Jolly's Estate, Re, 196 Cal. 547; 238 Pac. 353	74
Jones vs. Box Elder County, 67 Fed. (2d) 900	43
Kellogg & Sons vs. Hicks, 285 U. S. 502, 76 L. Ed. 903	44
Kingsland vs. Metropolitan Life Ins. Co., 97 Mont. 558, 37 Pac. (2d) 335	38
Lilienthal vs. United States, 97 U. S. 237, 24 L. Ed. 901	55
McClur vs. New York Life Ins. Co., 50 Fed. (2d) 972	39
McMahon vs. Cooney, 95 Mont. 138; 25 Pac. (2d) 131	69
Maki vs. Murray Hospital, 91 Mont. 251; 7 Pac. (2d) 228	70
Mar Shee vs. Maryland Casualty Co., 190 Cal. 1, 210 Pac. 269	74
Maryland Casualty Co. vs. City of South Norfolk, 54 Fed. (2d) 1032	42
Messinger vs. Anderson, 225 U. S. 436; 56 L. Ed. 1152	43
Metropolitan Life Ins. Co. vs. Broyer, 20 Fed. (2d) 818	39
Minneapolis Steel & Mach. Co. vs. Federal Surety Co., 34 Fed. (2d) 270	42
Missouri State Life Ins. Co. vs. West, 67 Fed. (2d) 468	30

TABLE OF CASES—Continued

	Page
Mobile, Jackson & K. C. Ry. Co. vs. Turnipseed, 219 U. S. 35; 55 L. Ed. 78	51
Myers vs. Pittsburgh Coal Co., 233 U. S. 184; 58 L. Ed. 906	46
Murray Co. vs. Harrill, 51 Fed. (2d) 883	29
New Amsterdam Casualty Co. vs. Breschini, 64 Fed. (2d) 887	64
New York Life Ins. vs. Gamer, 76 Fed. (2d) 543	16, 32, 42, 82
New York Life Ins. vs. Gamer, 90 Fed. (2d) 817	43, 51, 57, 82
New York Life Ins. vs. Miller, 81 Fed. (2d) 263	67
New York Life Ins. vs. Ross, 30 Fed. (2d) 80	60
New York Life Ins. Co. vs. Ross, 279 U. S. 852	60
New York Life Ins. Co. vs. Trimble, 69 Fed. (2d) 849	62
Nichols vs. New York Life Ins. Co., 88 Mont. 132, 292 Pac. 253	70
Olsen vs. Standard Oil Co., 188 Cal. 20, 204 Pac. 293	74
Packard vs. O'Neil, 45 Idaho 427, 262 Pac. 881	80
Panama Ry. Co. vs. Bosse, 249 U. S. 41, 63 L. Ed. 466	45
Parsons vs. District of Columbia, 170 U. S. 45	57
Penn. Mining Co. vs. United Mine Workers, 28 Fed. (2d) 851	42.
People vs. Millner, 122 Cal. 171, 54 Pac. 833	72
Phillips vs. Cuccio, 42 Pac. (2d) 1050	75
Pitt vs. Southern Pacific Co., 9 Pac. (2d) 273	74
Prudential Life Ins. Co. vs. Gamer, 76 Fed. (2d) 543	16, 32, 42, 82
Pythian Knights Supreme Lodge vs. Beck, 181 U. S. 49	29, 33, 40, 80
Reclamation District vs. Sherman, 11 Cal. App. 399, 105 Pac. 277	72, 74
Renland vs. First National Bank, 90 Mont. 424, 4 Pac. (2d) 488	69
Roberts vs. Cooper, 20 How. 467	42

TABLE OF CASES—Continued

	Page
Selover vs. Aetna Life Ins. Co., 38 Pac. (2d) 1059	64
Sinclair vs. United States, 279 U. S. 479	50
Small Co. vs. Lanborn, 267 U. S. 248, 69 L. Ed. 597	29
Smellie vs. Southern Pac. Co., 212 Cal. 540, 299 Pac. 529	73
Smith vs. Hollander, 85 Cal. App. 535, 259 Pc. 958	77
Solberg vs. Sunburst Oil Co., 73 Mont. 94, 235 Pac. 761	43
Stafford vs. Martinoni, 192 Cal. 724, 211 Pac. 919	74
Standard Accident Ins. Co. vs. Kiker, 165 S. E. 850	72
Standard Life & Acc. Ins. Co. vs. Thornton, 100 Fed. 582	61
State vs. District Court, 72 Mont. 213, 232 Pac. 201	68
State vs. Nielson, 57 Mont. 137, 187 Pac. 639	71
Sterling vs. Constantine, 287 U. S. 378	50
Story Parchment Co. v. Patterson Parchment & Paper Co., 282 U. S. 555, 75 L. Ed. 544	44
Stofer vs. Dunham, 208 S. W. 641	78
Sullivan vs. Metropolitan Life Ins. Co., 96 Mont. 254, 29 Pac. (2d) 1064	38
Supreme Lodge Knights of Pythias vs. Beck, 181 U. S. 49	29, 33, 40, 80
Travelers' Insurance Co. vs. McConkey, 127 U. S. 661	40, 46, 47, 80
Travelers' Insurance Co. vs. Wilkes, 76 Fed. (2d) 701	62
Troxell vs. Del. L. & W. Ry. Co., 227 U. S. 424, 57 L. Ed. 586	44
Tschubi vs. Metropolitan Life Ins. Co., 72 Fed. (2d) 305	76
Union Bank & Trust Co. vs. State Bank, 103 Mont. 260, 62 Pac. (2d) 677	71
United States vs. Axman, 193 Fed. 644	42
United States vs. Copper Queen Min. Co., 185 U. S. 495, 46 L. Ed. 1008	44

TABLE OF CASES—Continued

	Page
United States vs. Moreland, 258 U. S. 433	49
United States F. & G. Co. vs. Blum, 270 Fed. 946	64
Vicars vs. Aetna Life Ins. Co., 158 Ky. 1, 164 S. W. 106	38
Wells Fargo Co. v. Mutual Life Ins. Co., 66 Fed. (2d) 890	39
Western & Atlantic R. R. Co. v. Henderson, 279 U. S. 639	53
Zurich G. & A. Li. Co. vs. O'Keefe, 64 Fed. (2d) 768	43

STATUTES

Revised Codes of Montana, 1935, Sec. 10,600	69
Revised Codes of Montana, 1935, Sec. 10,602	68
Revised Codes of Montana, 1935, Sec. 10,604	69
Revised Codes of Montana, 1935, Sec. 10,606, Subd. 28	68
Revised Codes of Montana, 1935, Sec. 10,672	72
United States Code, Annotated, Vol. 28, Sec. 725	67
United States Code, Annotated, Vol. 33, Sec. 920	55

TEXTS

Cooley's Briefs on Insurance, Vol. 6, page 5454	37, 65
Cooley's Briefs on Insurance, Vol. 6, page 5460	37
Corpus Juris, Vol. 22, page 95	37, 67
Corpus Juris, Vol. 37, page 618	37, 66, 67
Jones on Evidence, Vol. 2 (2d Ed.) 859	69
Legal Medicine & Toxicology, by Haines, Peterson & Webster, 2nd. Ed. Vol. 1, pages 332, 335	16
Legal Medicine & Toxicology, by Haines, Peterson & Webster, 2nd. Ed., Vol. 1, pages 337, 343	27
Ruling Case Law, Vol. 10, page 868	71
Ruling Case Law, Vol. 14, Sec. 416, page 1236	37, 67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased.

Respondent.

BRIEF OF RESPONDENT

We believe respondent can better serve the Court by presenting her argument in the following order:

1. A discussion of the facts as disclosed by the pleadings and the evidence.

2. A discussion of the law presented by petitioner, as well as such authorities as we regard not only persuasive but conclusive of the correctness of the decision of the Circuit Court of Appeals herein.

In our discussion of the facts it becomes necessary to

indulge in some repetition of facts discussed in the Brief of Petitioner, but wherever it is possible such repetition will be avoided, and we will endeavor to so condense the facts that unnecessary space will not be consumed or unnecessary labor imposed upon the Court. In our presentation of the facts we believe we can best serve the Court by first giving our conception of what the evidence shows, and secondly, by discussing the conclusions regarding the effect thereof as urged by counsel for petitioner under the title,

ARGUMENT

An additional word of explanation is offered because we are presenting our argument in the order heretofore announced,

We have been informed by counsel for petitioner that they do not intend to file any brief other than those heretofore filed in support of the petition for a Writ of Certiorari herein. Inasmuch as the brief filed by respondent in opposition to the issuance of such Writ contains no discussion of the facts, and the citation of only a limited number of cases regarded as applicable, we believe it necessary that an additional brief be filed by respondent, in which a further review of both facts and the law may be brought to the attention of the Court.

In the brief of counsel for petitioner they first discuss the law and thereafter the facts. We believe it best that our discussion proceed in the reverse order, and we shall so do.

UNDISPUTED FACTS

The record herein discloses the following undisputed facts: E. Walter Gamer, at the time of his death was 51 years of age; approximately 5 feet 10 inches tall; weighed approximately 180 pounds; was possessed of a jovial disposition, was regarded by his friends as being a congenial, cheerful person; his home life was at all times ideal; he was the father of one child, Elsie Jane Gamer, who at the time of his death was 11 years of age. Mr. Gamer's family life was very happy, and he was devoted to his wife and daughter. His daughter was his pal. Mr. Gamer was strong physically; his health was of the best, and he was a man who enjoyed outdoor life and frequently would go fishing and at times hunting.

Whenever he would go fishing he always carried a gun—sometimes a shot gun; other times a revolver, and at times a rifle. Upon occasions he was known, when on fishing trips, to have taken with him the rifle from which the shot here in question was fired. This rifle was a 300 model 99 Savage rifle, the muzzle velocity of which was and is 2700 feet per second, and the muzzle energy of the 150 grain bullet used in said rifle at the muzzle was 2430 pounds, meaning that the bullet fired from the rifle at the time it leaves the rifle would have a muzzle energy in foot pounds of 2430, which as we understand it, means the force and energy would be sufficient to raise 2430 pounds vertically one foot, or sufficient to raise one pound 2430 feet at muzzle velocity.

Mr. Gamer's body was found on the morning of April

10, 1933, in a clothes closet leading from the bedroom of his home, which clothes closet was 5 feet 10½ inches long and 2 feet 3½ inches wide, the door leading from the bedroom thereto, was 23¾ inches wide, and the ceiling was 8 feet 9¾ inches from the floor. When Mr. Gamer's body was found, his legs to his knees were in the closet, and the rest of his body in the bedroom, the entrance to the closet being on the west side thereof, and the length being easterly and westerly. When the body was found Mr. Gamer was lying on his back with his head toward the west and his feet toward the east. He was fully dressed in clothes worn by him on fishing and hunting trips.

The night before, a visitor at the house, who remained until 10:00 o'clock p. m., found Mr. Gamer apparently in good health, very jovial, and particularly happy because he contemplated again going into business. (81 R.)

The Gamer home was a two story residence, the bedroom and closet in question being on the second floor, while the kitchen, dining and sitting room were on the first floor, underneath of which there was a basement, also used as a laundry. On the morning of his death Mr. Gamer came down stairs at about 9:30 o'clock and remarked to his wife and daughter, "I think I'll go fishing." (136 R.) He was dressed in his fishing clothes. When he came down stairs he did not have a hat on his head or in his hand. (137 R.) *When his body was subsequently found, his head was in a hat.* (Italics supplied.) (See testimony of Gillis, 41, 51 R.; Anderson, 80 R.; Cumming, 86, 95 R.; Murphy, 103, 108 R.; McHaffey, 155 R.)

Mr. Gamer engaged in conversation with his wife and daughter, and all three had breakfast together. He ate his usual breakfast consisting of "some fruit, two eggs, two cups of coffee, and two pieces of toast." (137 R.) After serving Mr. Gamer his second cup of coffee his wife went down stairs to do some washing, and while so engaged heard their daughter and Mr. Gamer talking and laughing up stairs, the daughter washing the dishes, and Mr. Gamer drying them. This consumed approximately twenty minutes or a half hour. Thereafter, Elsie Jane, the daughter, went to the basement to help her mother with the washing, while Mr. Gamer, following his usual habit and custom, sat in the front room reading the morning paper. He remained there approximately a half hour, when his wife heard him going up stairs. (138 R.) Subsequently, when a call came for Mr. Gamer, his body was discovered in the position and at the place hereinbefore described.

The rifle was kept in the closet adjoining the bedroom, wherein was also kept a shot gun and his fishing outfit, as well as his other clothes (138 R.), Mr. Gamer also had a pistol, a 22 Colt's automatic, in the closet, which was kept on the shelf to the left as you enter the closet. This pistol was loaded and was kept as protection for Mrs. Gamer and Elsie Jane when they would be alone in the house as a result of Mr. Gamer going fishing or hunting. (139 R.) It was on the shelf in the closet, fully loaded with eight shells, on the day of Mr. Gamer's death. (118, 139 R.) This was where it was always kept. (119 R.) Mr. Gamer had repeatedly warned his

daughter not to go in the closet because he had guns in there. (120, 121 R.) This closet was crowded, and it was very difficult to move around therein. (140 R.). There were shelves on either side and in the rear end of the closet, and clothing hanging on both sides of the closet and on the end wall; also a pole on which clothes were hanging. (42, 85, 107 R.)

Mr. Gamer left no note or message. (112, 121, 140 R.) Mr. Gamer made no complaint to his wife about financial difficulties (140 R.), neither did he make any complaint to his friends of any such difficulties. (84, 130 R.) A week or ten days before his death Mr. Gamer purchased two suits and an overcoat. (88, 96, 121, 140 R.) The Saturday evening before his death Mr. Gamer, accompanied by his wife, had attended a dinner and card party in conjunction with other members of a card club, and was in the company of the members of said club from 7:00 o'clock in the evening until 1:00 or 1:30 Sunday morning. There he showed no change in his disposition. He was cheerful. (129 R.) On the afternoon of the day before his death about 4:00 or 4:30, Mr. Gamer was in the company of a friend of many years standing. His disposition seemed fine, and Mr. Gamer was in a cheerful and happy frame of mind. (131 R.) He tried to induce this friend, P. E. Geagan, to go fishing with him the following day. "He told me he was going fishing on Monday." (131 R.) Mr. Gamer was quite insistent that Mr. Geagan accompany him on the fishing trip. (131 R.) He had also tried to induce another friend to go fishing with

him the beginning of the next week. (116, 117 R.)

The pistol or revolver to which reference has hereinbefore been made was found after the death of Mr. Gamer on the upper shelf of the north side of the closet in which Mr. Gamer's body was found. (118 R.)

Mr. Gamer had no upper natural teeth, but used a denture composed of 14 teeth, which was held in Mr. Gamer's mouth by suction and moisture. He had six natural teeth in his lower jaw, to which were attached a partial removable appliance of four teeth. This was known as a removable denture or plate. (173 R.)

At the time of Mr. Gamer's death, and for many years prior thereto, he had been the owner of a 5/12 interest in the Gamer Confectionery, Inc., a confectionery business and cafe in the City of Butte, which business had been destroyed by fire in October, 1932. The company received $32,000.00 fire insurance, and about $7500.00 use and occupancy insurance. On April 25, 1933, the company had a bank balance of $10,394.57, was the owner of 50 shares of First Bank Stock Corporation of the value of approximately $7.00 to $10.00 per share; also notes receivable $144.99; accounts receivable $449.88; salvage in furniture, fixtures and equipment carried on the books of about $5900.00 (71 R.), or a total of $16,788.87. (72 R.) This did not include *Good Will.* (75 R.) During the year 1932 Mr. Gamer's income tax return showed his personal gross income to be $11;493.43, of which $4,166.85 consisted of salary, and $7531.97 dividends, all but $31.97 of which were dividends from Gamer Confectionery, Inc. (73 R.) Mr. Gamer

had the right to draw checks upon the $10,394.57, being the bank balance of Gamer Confectionery, Inc., at the time of his death. (70 R.)

After Mr. Gamer's death, and in the preparation of body for burial, the upper plate fitted into his mouth normally. (32 R.) The upper gum was not lacerated. (63, 146 R.) There was no wound or laceration on the lower gum. (147 R.) The upper plate was not injured in any way. (58, 62, 147 R.) The back of Mr. Gamer's head was badly shattered or blown out about the joint of the parietal bone of the skull, which opening was about 3½ inches. (60 R.) He had a laceration on the upper left side of the lip about 1/8 or 2/8 of an inch from the left corner of the mouth, which extended upward on the upper lip and was about ½ inch long (61 R.), from which there was no missing skin. It was held together by muscle fibre. (63 R.) The edge of the lower bridge or plate in Mr. Gamer's mouth, at the time his body was found, was sticking out with the teeth turned outward. (58 R..) There were three fractures on the right side in the middle of Mr. Gamer's lower jaw. (65 R.)

The shells for the rifle in question were kept in the bedroom adjoining the closet where his body was found. (98 R.) When the rifle was examined immediately after the death of Mr. Gamer there was but one empty shell in the gun. (88 R.) The rifle in question had been carried by Mr. Gamer on different fishing trips. (41, 43, 49, 87, 88, 118, 125, 130 R.) The testimony also shows that while Mr. Gamer's habits with fire arms were careful, "he was jumpy." (121 R.)

The "Double Indemnity Benefit" provided for in the policy was not a gratuity on the part of the insurance company, but an annual premium of $10.00 was paid by decedent. (11 R.)

The tender to respondent of the face value of the policy was conditioned upon the surrender by her of the policy and the signing of a receipt accepting said sum *"in full settlement of all claims under policy."* (196 R.) (Italics supplied.)

The foregoing facts are all undisputed.

We now invite the Court's attention to some facts concerning which there is some slight dispute. We refer to the testimony regarding where Mr. Gamer's glasses were found. One witness testified they were 16 to 18 inches from the door of the closet. (42 R.) Another witness testified they were inside of the clothes closet close to Mr. Gamer's feet. (103 R.) Another witness testified they were alongside of the plate, which was on the north side of Mr. Gamer's body at about the calf of his leg. (119 R.) Inasmuch as the testimony shows that Mr. Gamer's legs, from his knees down, were in the clothes closet, it will be observed that the location of the glasses is placed at about the same position by the foregoing testimony. The only contradiction of this is the testimony of the doctor who testified the false teeth and glasses were in the far end, the east end, of the closet. (151 R.) The testimony with reference to the plate is that it was about 12 inches or about 16 or 18 inches from the door of the closet. (53 R.) The cor-

oner, Con Murphy, testified that they were just inside the closet, being handed to him by Dr. McHaffey. (103 R.) Mr. Davis testified they were just inside the entrance of the closet, about the calf of Mr. Gamer's leg (119 R.), while Dr. McHaffey testified they were at the far or east end of the closet. (151 R.) Thus again, it will be noticed three witnesses agree the plate was just inside the closet door, while one witness places it at the extreme or easterly end of the closet.

In this connection we invite the Court's attention to the fact that there were old clothes and shoes in the back part of the closet on the floor. (118 R.)

At the time of the discovery of Mr. Gamer's body a hole in the ceiling of the closet was observed. The location and dimensions, as well as the character of the hole, is somewhat in dispute. One witness testified that the hole was "just inside of the closet, and it would be about in the center of the north and south side of the closet over the door. That bullet hole was sort of an oblong hole; it was larger at one side than at the other; it was irregular in the ceiling. In my best judgment it may be eight or 10 or 12 inches or some such matter, in from the door of the clothes closet." (52 R.) Another witness testified, "I saw the hole in the ceiling. That hole was kind of an oblong hole and had a lot of blood and stuff around it; the hole was longer than it was round; it appeared to have been recently made." (32 R.) Another witness said, "I saw a bullet hole in the ceiling of the closet, and it was close to the door. I would say it was maybe 18 inches, to the best of my judg-

ment, from the door, or something like that, but, of course, I didn't measure it. I couldn't state which wall it was close to; it looked kind of around the center. That was a plaster ceiling; as I recollect, the bullet hole was a hole about the size you could *push a lead pencil in.* (Italics supplied.) There was some blood and flesh surrounding this hole." (107 R.) Another witness testified, "That hole in the ceiling was mid-way between the north and south wall and about one foot in from the door, I would say; that would be about one foot east of the door entering into the closet. That was a plaster ceiling. I would judge the size of that hole to be about the size of a *twenty-five cent piece.*" (Italics supplied.) (151 R.)

With reference to the gun and its position, the testimony is likewise in conflict. It was testified, "When I saw the gun this morning when I went to the Gamer home, it was lying parallel with the body, with the muzzle pointing west. Mr. Gamer did not have hold of the gun; the gun was lying outside of his hand; his hand was next to his body, and the gun next to his hand." (42, 46 R.) Merle Davis testified, "I saw this rifle, plaintiff's exhibit 1, there that morning, and to describe where it was, Walter's feet were separated, I would say about a full foot, the butt of the rifle between his feet and slanted up this way across his body with the barrel pointing west and south, a little south and diagonally west. He did not have a hold of the gun with either hand." (119 R.) The witness McHeffy testified, "The stock of the gun was between the feet

of Mr. Gamer, and he was holding the barrel of the gun in his left hand. The left hand was just slightly above the crotch clutching the barrel of the rifle; the left hand was just above the crotch, about in here. I am laying my hand on my body about a little below the navel, and in that hand he held the barrel of this gun; the hand was held just about an inch or two from the muzzle; the stock of the gun was between his feet; his right hand was across the chest." (149, 150 R.) Coroner Murphy testified, "When I got there the right hand of Mr. Gamer was down by his side; the gun was off this way a little; the hand up this way; the muzzle of the gun here was pointed across the body, and that would be the southwest direction, mostly west."

Q. In describing this gun, the hold that Mr. Gamer had on the gun, how far beneath the sight——

A. I would say it was down about six inches; the hold was like that.

THE COURT: With the left hand?

A. In the left hand like if the gun was being packed this way, it was just like that.

Q. With the thumb on the upper——

A. Well, like that.

Q. Now, did he have a tight or loose hold?

A. I just loosened his fingers and took the gun right out. *I would say it was a loose hold. I don't think there was any blood on the gun.* (102 R.) (Italics supplied.)

This conflict or discrepancy regarding the position of the gun cannot be explained by any contention that Dr. McHaffey was first on the scene, having arrived before

Mr. Davis, Mr. Gillis and the coroner. Such was the fact, but as Dr. McHaffey testified, "I was the first man there as far as I know. I don't think anything was disturbed in that closet from the time I got there until the coroner arrived. I saw Mr. Merle Davis there; saw Malcolm Gillis there; saw them upstairs. I don't think anything in that closet was disturbed from the time I got there until they got there. I saw Mr. Cummings there. Nothing was disturbed when he got there. When I lifted up the head of Mr. Gamer that didn't disturb the gun; didn't move the body; it didn't move the body picking up the head. I didn't move the body at any time.

The condition and position of the gun and body, the position of the body and gun at all times I was there, was undisturbed until it was removed by the undertaker." (154 R.)

The testimony also shows without any contradiction that when the rifle was found there was no blood upon it. (88, 119 R.)

A cigar stub was found upon the window sill on the south of the clothes closet. (42, 47, 99, 107, 109, 120 and 151 R.) It gave every appearance of having been recently smoked. (109, 120 R.)

There is further uncontradicted testimony that Mr. Gamer, on the Friday previous to his death, had made an appointment to meet Mr. Gillis on the morning of April 10th, at 11:30 a. m. (44 R.), This engagement related to a fraternal question and was unimportant and could well have been postponed to any time. (54 R.)

In the policy of insurance there was contained this provision: "The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law." (11 R.) No such autopsy was made or attempted.

In the foregoing analysis of the evidence we have not attempted to give the testimony of each witness in detail, but have confined ourselves to a review of such testimony as would be of aid in a determination of the issues.

We shall now analyze and comment upon the argument of counsel under the heading

"THE PHYSICAL FACTS SHOW SUICIDE"

(Petitioners brief, p. 43.)

Counsel first refer to the witness Clyde McNeil as a ballistic expert. No such pretentions were made by the witness, whose qualification as an expert of any kind consisted only of having clerked in various stores in Butte, Anaconda, and Missoula, Montana, for a period of approximately 20 years, during which time he had charge of sporting goods departments, in which were handled different makes of guns, and as a part of his duties repaired guns, tested guns for accuracy and also for penetration. (198 R.) With reference to the testimony of this witness regarding experiments, counsel emphasized the fact that these experiments were made at the request of counsel for respondent; however, the witness also testified that he was interviewed at the time of the first trial by the defendant, but was not subpoenaed

as a witness by either party. (222 R.) With reference to the distance at which powder marks would show on flesh, he stated, *"I really don't know at what distance powder marks would show on flesh."* (Italics supplied.) (222 R.)

Counsel claim that Mr. Gamer was right-handed, and the gun was clasped in his left hand about six inches below the sight. They further conclude that the butt of the gun was on the floor when the shot was fired; otherwise the recoil would have kicked or dislodged it from his grasp. The witness Gillis testified that Mr. Gamer did not have hold of the gun. (46 R.) Similar testimony was given by the witness Davis (119 R.), and while it is true that the witness Murphy testified that Mr. Gamer had a loose hold on the gun (102 R.), as did Dr. McHaffey (159 R.), the doctor testified that Mr. Gamer's hand was about an inch or two from the muzzle (150 R.), while the coroner testified that it was six inches below the sight. (102 R.) The testimony of Mr. McNeil then is that if the gun was held in the hand and the person attempted to put the muzzle in the mouth and then pulled the trigger, the recoil would throw the gun some distance away. (219 R.) Counsel, however, contend that the gun was upon the floor and held in the left hand of Mr. Gamer, and he pulled the trigger with his right hand. This contention is disputed by the physical facts. Furthermore, had Mr. Gamer so held the gun in contemplation of killing himself, well recognized authorities assert, that in such event, the hold of Mr. Gamer on the gun when his body

was found would have been tight and firm, and would have required considerable effort to loosen it.

In this connection, and in support of our contention, we invite the Court's attention to

> Vol. 1, Legal Medicine and Toxicology, by Haynes, Peterson and Webster, 2nd Ed. p. 332,

wherein it is said:

> "If a weapon is tightly clasped by the hand of the dead man, suicide is practically certain."

and on page 335, the authors say:

> "If tightly clasped, it is excellent evidence of suicide, as already mentioned."

Counsel next contend that the bullet hole in the ceiling shows that the gun was fired at approximately a right angle to the floor of the closet. The exact location of the hole is a matter of dispute among the witnesses. One witness placed it eight or 10 or 12 inches from the door; a sort of oblong hole, larger at one side than at the other, and irregular. (52 R.) Another witness described it as an oblong hole, longer than it was round. (82 R.) Another witness placed the hole at 18 inches from the door and about the size you could push a lead pencil in (107 R.), while still another witness described the hole as being midway between the north and south wall one foot east of the door entering into the closet, and the size of the hole to be about the size of a twenty-five cent piece. (151 R.)

Upon the first appeal of this case

> Gamer vs. New York Life Ins. Co., 76 Fed. (2d) 543,

Judge Wilbur stated, *"A single hole in the ceiling of the closet would not indicate the position of the gun or the insured's head at the time of discharge.* (Italics supplied.) The size of the bullet hole would make it clear that it did not strike the ceiling perpendicularly, for in such case the size of the bullet hole would be the same as the calibre of the rifle, 3/10 of an inch, unless it be assumed that the bullet mushroomed as a result of the contact with the skull of the deceased. There is no evidence that under such circumstances such a bullet would mushroom."

The testimony with reference to the location of the hole was identical upon the second trial with that given at the first trial. With reference to the mushrooming of the bullet, the witness McNeil testified as to certain makes of bullets mushrooming (203, 209, 217 R.), but in this connection it must be observed that he was speaking of a bullet such as he had sold the decedent some seven months prior to the time of decedent's death. The shell of the bullet was not available at the trial (106 R.), and the record fails to disclose the kind of bullet which caused the death of Mr. Gamer. Furthermore, Mr. McNeil's testimony refutes the statement of counsel regarding the significance of the bullet hole in the ceiling. The witness states, "A hole in the ceiling, being an oblong condition, or oblong hole, would not indicate anything to me. It would not have any significance in determining the position of the rifle at the time it was discharged. The only thing it would indicate to me would be that the bullet might be deformed. It

would not indicate the distance from the object originally struck or first struck that the rifle was held.

Q. So that the hole in the ceiling, being made after it struck an intervening object, would not aid you in determining the distance at which the rifle was held from the original object struck?

A. I couldn't say that, no sir.

I mean that it would not have any significance in determining that matter." (217 R.)

We shall now make brief reference to the testimony of Charles R. Leonard, one of counsel for petitioner regarding a demand to inspect and survey the closet in the Gamer house. This demand was made October 25, 1935 (158 R.), almost two and one-half years after the death of Mr. Gamer. That the demand is and was unauthorized must be conceded. The facts are that when the demand was made the house was rented (163 R.), and upon request by Mr. Leonard he was furnished with the name of the tenant. (164 R.) No court order for such inspection was requested. (164 R.)

Prior to the first trial of this case an *oral request* was made by counsel for petitioner for leave to inspect the premises, which was granted, and an inspection and map of the closet made (165, 166 R.), also in response to a further *oral request* by counsel for petitioner, a couple of days later a further survey of the bedroom and closet was made. (167 R.) An *oral request*, before the first trial, was likewise granted. (168 R.)

It is not without significance that all requests for inspection of the premises or the rifle, before the first trial, were made orally, and as readily granted as asked. Why then the formality in making the unusual request prior to the second trial? The question suggests the answer. It had no sanction in law and was made with the hope it would be refused and the refusal brought to the attention of the jury in the hope it would prejudice respondent. It will not suffice as an answer to say we could have objected to Mr. Leonard's testimony because to have done so would have placed us in a false position before the jury, namely, of trying to suppress testimony. We followed the only logical plan, namely, to have placed all the facts in the possession of the jury.

We have perhaps attached too much prominence to this testimony, but we feel justified in so doing because we did not want this Court to entertain the thought we were guilty of trying to suppress testimony.

It is next contended by counsel that the deceased was always careful with a gun. This is true, but he was likewise jumpy (121 R.), and while the trigger pull on the rifle in question was 3½ pounds, this was regarded by the witness McNeil as an easy pull. (213 R.)

Much is said by counsel regarding the upper set of teeth and its being found upon the floor at the time Mr. Gamer's body was found. They contend that if he took them out he tossed them in the closet. Their position is somewhat in dispute. Dr. McHaffey testified they were in the far or east end of the closet (151 R.), but every other witness testified they were just inside

of the closet entrance. (42, 55, 57, and 103 R.) If the testimony of Dr. McHaffey is correct it may be inquired, how was it that the plate was not found among the shoes and clothes which were laying around the floor of the closet? (118, 152 R.) We believe it a fair assumption from the testimony that Mr. Gamer's upper plate and his glasses were found just inside of the clothes closet. If we are correct in this assumption, there can be no question but what the glasses were knocked from his nose and the upper plate from his mouth by the force of the explosion. If the gun was in the mouth, the explosion would have destroyed the upper plate, and the force thereof would have likewise destroyed the glasses. The fact that the glasses were not injured, except the nose piece, establishes almost beyond question that the gun was not in the mouth. On the other hand, if the denture was in the mouth, and Mr. Gamer inserted the rifle therein, causing it to explode while in the mouth, the shock would have destroyed the denture. (175 R.) If, on the other hand, the denture was removed, can it be seriously contended that the muzzle of the rifle was in the mouth, with its terrific discharge and the flame resulting therefrom (204, 207 R.) would not burn or sear the interior of the mouth? (See also testimony of Dr. Shields, 191 R.), whereas, the testimony here is that the upper gum was not burned, seared, or lacerated (63, 146 R.), and that there was no wound or laceration on the lower gum. (157 R.) The witness McNeil also testified that a bullet from the rifle in question fired into the mouth at a dis-

tance of 14 inches would not be as destructive as if it were placed in the mouth and fired; also that a bullet discharged from such a rifle at a distance of 14 inches would be of sufficient force "to tear out the back of the head, but as far as the other tissues and parts are concerned, I would feel it would be less likely to destroy any other membranes of the skull. The closer to the mouth, in my opinion, the greater the damage." (225 R.) Again, "If the muzzle were not in the mouth, if the muzzle was away a distance of 15 to 20 inches from the mouth the force of the blow would be sufficient to blow out the back of the head, but the damage to the other parts of the face or skull would be less great than with the muzzle in the mouth." (225 R.)

In view of this testimony it would seem futile to argue that the muzzle of the rifle was in Mr. Gamer's mouth at the time of its discharge. We realize that Judge Wilbur in his opinion upon the first appeal, said, "There is no trace of bullet or powder marks upon the face and no point of entry of the bullet shown upon the body, leading irresistibly to the conclusion that the muzzle of the gun was in the mouth of the deceased at the time the rifle was discharged."

The testimony of the expert McNeil was not before the Circuit Court of Appeals upon the first appeal of this case. His testimony, as hereinabove quoted, effectually establishes that at a distance beyond 10 inches from the face of the decedent, no powder marks would show upon the face. Our contention is that Walter Gamer, after reading the paper on the morning of April 10th,

decided to go fishing. He went upstairs for his hat, his rifle and fishing equipment; the hat being easily reached he placed it upon his head, reached for and pulled out the rifle from the rear end of the closet, and while pulling the rifle from where it was stored and while pulling it past the many clothes in the closet, many of which were hung on the pole stretched from the north to the south side thereof, some of the clothing caught on the trigger of the rifle, the safety not having been set, with the result that the rifle discharged and Gamer received the wound which resulted in his death.

The fact that no powder marks showed on Mr. Gamer's face is significant in view of the fact that the experts for petitioner were unable to state at what distance a bullet discharged from a rifle such as killed Mr. Gamer would show powder marks on the flesh. The witness McNeil couldn't tell at what distance powder marks would show on flesh (222 R.), while Dr. Kistler testified at 10 inches distance from the face it would not likely show any powder burns. (231 R.) It being testified by one of the experts that if the muzzle of the gun had been held in Mr. Gamer's mouth it would have blown off his entire head (R. 223-225), also that the rifle discharged in the mouth would burn or sear the flesh or tissues (R. 221, 191), and it appearing that the force of the explosion only destroyed the back part of the head, about the joint of the parietal bone of the skull (R. 60), without any searing or burning of the tissues in the mouth it is an irresistible conclusion that the rifle at the time of its discharge was more than 10 inches from the face of Walter Gamer.

The testimony shows that a cigar stub was found upon the window sill in the clothes close at the time of the finding of Mr. Gamer's body. It gave indication of having been recently smoked. If Mr. Gamer contemplated suicide, and was so careful regarding the cigar stub, why would he not have been equally careful regarding his plate and his eye glasses? Why did he not also place them on the window sill? This gives credence to our contention and clearly establishes that he was wearing the eye glasses and the plate at the time the rifle was discharged, and both were knocked to the floor by the force of the explosion. Regarding the lower bridge work, which was turned upside down and protruding from his mouth, there is no tetimony in the record indicating that the force of the explosion, if the muzzle of the rifle were held at a distance of 12 inches or more, would not be sufficient to force this bridge work outward as it was found; in fact, if the force of the explosion was sufficient to pull the upper denture out of the mouth, it gives credence to the contention that the wire which attached the lower bridge to his natural teeth prevented it from likewise falling to the floor.

With reference to the wound in the upper left lip, there can be no question but what it was caused by the protruding teeth; in fact, Dr. Shields, an expert witness for petitioner, so admitted. (188, 189 R.)

With reference to the three breaks in the jaw of the decedent, the testimony is that if the muzzle of the gun were held in the mouth, there would be no reason why

it should break the right jaw and not the left jaw. (193, 237 R.) Furthermore, these fractures could have been caused by the fall after injuries were inflicted. (237 R.)

Counsel next discuss the effect of 2430 foot pounds of muzzle energy being exerted instantaneously within the confines of a human mouth, saying such a force would result in blowing the mouth open. With this we agree, but contend that not only would it force the mouth open, but it undoubtedly would blow off the person's entire head.

It is contended that the gun was within the mouth of Walter Gamer when he fired the shot which ended his life, and that this was conceded by everyone except the trial judge. This statement, except insofar as it applies to the trial judge, is without any basis; in fact, not only upon the first appeal, but at all times, save when necessary for the sake of argument, the contention of counsel for respondent has been that the muzzle of the gun at the time of its discharge was not in the mouth of decedent.

The foregoing discusses, and, we believe, fully answers the various contentions raised by counsel for petitioner in their brief herein, save only the contention that Mr. Gamer at the time of his death was indebted in the sum of $14,711.50, which statement is based upon the fact that in 1932 Mr. Gamer paid interest in the sum of $882.69, which sum capitalized at 6% would show an indebtedness in the above sum of $14,711.50.

It is true that said interest capitalized at 6% would show such an indebtedness, but at the time of Mr. Gamer's death the legal rate of interest in Montana was 8% (Sec. 7725 R. C. M., 1921), and parties could agree to a rate of interest not in excess of 10%. (Sec. 7726 R. C. M. 1921.) At 10% the amount of interest paid by Mr. Gamer would show an indebtedness of $8826.90, and it would be a testimonial to a person's financial stability if, in 1932, he could have borrowed money in the City of Butte at less than 10%. No one in financial distress could have done so, and we believe general experience teaches us that a person able to borrow $14,711.50 at any rate of interest must either have adequate collateral or a very splendid credit, either of which negatives the idea the individual was suffering from financial troubles.

Mr. Gamer was a resident of Butte for many years before his death. His estate was probated in Silver Bow County. (4, 26 R.) If he had any indebtedness at the time of his death, claims would have been filed against his estate, and therefrom it could have been definitely determined the amount of his indebtedness at the time of death. The record is silent as to any indebtedness owed by Mr. Gamer. It does show that he paid an income tax in 1932 on an income of $11,493.43, and if it be true that he did owe $8826.90, which is the amount of interest he paid in 1932 capitalized at 10%, he could have paid said indebtedness and still retained almost $3000.00 during said year for his living expenses. Furthermore, the testimony of every witness

in this case is that there was no change in Mr. Gamer's disposition or demeanor during the latter years of his life. On the very morning of his death he ate his usual breakfast; he was jolly, good natured; he dried the dishes his daughter washed; he played with her, and then, as was his usual custom, went into the sitting room to read the morning paper. Are these facts consistent with those of a man contemplating suicide? The question not only suggests the answer, but effectually disposes of the contention that Mr. Gamer was harassed by financial difficulties. He still retained 5/12 interest in the Gamer Confectionery, which interest at the time of his death was worth in the neighborhood of $8000.00. He was drawing a salary during the entire time that the corporation was out of business, and the evening before his death expressed his happiness in knowing that a location had been secured and the corporation would soon again open.

We trust it will not be considered an imposition if we quote from additional testimony given by the witnesses McNeil and Kistler. We do so because it is upon their testimony so much reliance is placed by counsel for petitioner, and because we wish to show that such testimony has no great probative value because of admission made by said witnesses which are consistent with recognized authority. The witness McNeil concluded his testimony by the following admission: "Bullets don't act twice the same way, and even under a given set of circumstances they won't do the same thing." (227 R.) The witness Kistler testified:

Q. And the distance that the bullet will be deflected is entirely problematical?

A. Exactly, that is, the exact amount.

Q. So that it cannot be said with any degree of definiteness just how far a bullet will be deflected striking the occipital bone?

A. Not absolutely, no.

Q. You say it cannot be definitely stated how far a bullet will be deflected. Do you mean you could tell within 10 inches?

A. *I could if I knew the angle at which it struck and the material it struck and the distance away, which would measure your amount of deviation.*" (239 R.) (Italics supplied.)

The witness also testified with reference to the effect of the explosion of a gun, the muzzle of which was in the mouth of a person, regarding whether it would force the body backward or forward, and he answered "I cannot estimate exactly, because I don't know how far forward, or what the balance of his body was." (233 R.)

In connection with this testimony we invite the Court's attention to the following quotation:

> "A bullet might be battered by its first impact with bone and its further penetration considerably reduced or interfered with."
>
> "Rapid changes in powders and fire arms make it almost impossible to discuss the different phenomena associated with their discharge and the character of the wounds and the concomitant changes. Each case must be individualized."
>
> Vol. 1, Legal Medicine and Toxicology, by Haynes Peterson and Webster, 2nd Ed., pp. 337, 343.

We believe the foregoing constitutes a fair summary of the evidence. We may have been guilty of some slight repetition, but wherever this occurs the responsibility rests upon our desire to emphasize certain evidence which we regard as important in a determination of the law applicable to facts such as here presented.

The facts proved, as suggested by Judge Denman in his opinion, are not in their essence different from those presented on the first appeal. (328 R.) If there is any variance it will be found in the attempt by petitioner to supplement the testimony offered by it on the first trial by so-called expert testimony. Such testimony lost much of its value by the admission of the so-called experts that to form or express a definite opinion as to the matters upon which they were questioned it would be necessary to be given additional information regarding the distance from which the rifle was discharged, the position of decedent at the time of discharge and other similar facts. Without these they admitted their opinions were no more than conjecture or surmise. Did such testimony further fortify petitioner in its claim that Walter Gamer committed suicide? We think not, and invite attention to the language of this Court in

The Conqueror, 166 U. S. 110;

wherein it was held:

> "The ultimate weight to be given to the testimony of experts is a question to be determined by the jury, and there is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinion of such witness."

With the foregoing in mind we shall now present such additional authorities as in our opinion declare the law here applicable.

It is our contention that upon the trial plaintiff was required to prove that Gamer died on the morning of April 10th and that he died as the result of external and violent means. This proof was then aided by the presumption of law that his death was accidental, which, in the absence of contradictory proof, was sufficient to take the case to the jury. The evidence in this case was not only sufficient to take the case to the jury, but when taken as a whole it is debatable if it did not justify a directed verdict for plaintiff.

It must be conceded that

> "If the evidence is such that reasonable minds would draw different conclusions from it, it is a case for the jury."
>
> Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720.

> "A verdict should only be directed when the evidence is undisputed, or when it is of such conclusive character that a verdict to the contrary should be set aside."

See

Small Co. vs. Lanborn, 267 U. S. 248, 69 L. Ed. 597;

Murray Co. vs. Harrill, 51 Fed. (2d) 883, 884 (3 and 4).

With the above statements in mind we invite the Court's attention to the case of

Pythian Knights vs. Beck, 181 U. S. 49,

a case wherein the facts strongly suggested suicide, and the Court held:

> "Whether the deceased committed suicide was a question of fact and a jury is the proper trier of such questions."

The above is the last expression by this Court of the rule to be followed in cases of this kind.

See also

Missouri State Life vs. West, 67 Fed. (2d) 468.

Where evidence as to whether insured's death was accidental or suicidal is such that reasonable men might draw different conclusions, the question is properly submitted to a jury in actions on accident policies excluding liability in cases of suicide.

See

Fidelity & Casualty Co. vs. Pittinger, 63 Fed. (2d) 880;

Home Benefit Ass'n. vs. Sargent, 142 U. S. 691, 697, 701.

Under the heading

"SURMISE OR CONJECTURE WILL NOT SUSTAIN A JUDGMENT." (Petitioner's Brief, p. 51) counsel cite several authorities. With the cases cited we have no quarrel, but seriously question their applicability to the facts herein. A reading of them will disclose that those which involved the question of accident or suicide are easily distinguishable upon the facts,

while those which declare the law that surmise or conjecture will not sustain a judgment are in accord with our understanding of the rule of law. We seriously urge that the evidence in this case is so far different from that found in the cited cases that the rule announced does not here apply.

In this case there is a total absence of motive for or intent to commit suicide. A further and brief review of the facts will disclose the dissimilarity of the facts herein with those in the cases cited. The uncontradicted testimony shows the deceased to have been a man in the prime of life, happily married, devoted to his wife and daughter, in good health, a delightful companion, of good disposition and jolly demeanor, not involved in any affairs which would cause him mental concern, who contemplated a fishing trip upon which he was accustomed to carry a rifle or fire arm of some kind. This rifle is in a clothes closet which is overcrowded because of many clothes hanging therein, and lying upon the floor. The day before he tries to induce a friend to accompany him on the fishing trip; at breakfast he announces to his wife and child he is going fishing. He is dressed in his fishing clothes; he had no hat upon his head when he comes downstairs; subsequently when his body is found his head reposes in a hat. The room in which the body is found is so restricted as to space as to make it hardly possible to move about therein. The shells for the rifle from which the bullet was fired were in a drawer in the bureau in a bedroom adjoining the closet where the gun was discharged, which bedroom

was approximately 13 feet by 12 feet in dimensions. But one shell, and that one empty, was found in the rifle. When his body was found he was fully dressed. The question presents itself, why did he, if he was contemplating suicide, take the shell from the drawer in the bureau in the bedroom to the restricted confines of the clothes closet, there to load the rifle, when it would have been far easier to have taken the rifle to the bedroom, there load it and shoot himself? This would have dispelled any chance for a miscarriage of his plans. Why load the rifle with only one cartridge when more were available?

The further question presents itself, what was his purpose in putting his hat on his head? Furthermore, as was suggested by Judge Wilbur in his decision upon the first appeal of this case, "In considering whether or not death was suicidal or accidental, it should be observed that the preparations made by the insured for his hunting trip are entirely inconsistent with the idea that he was contemplating suicide, unless we assume that the deceased was deliberately intending to create the semblance of an accident with a view to assisting his widow in the collection of double indemnity upon his insurance policy. If such was his purpose, it would seem that a person of reasonable intelligence would realize that *a much more plausible appearance of accident could be simulated somewhere on the proposed fishing trip than in the small closet where the direction of the bullet could be readily traced.*" (Italics supplied.)

Gamer vs. New York Life Ins. Co., 76 Fed. (2d) 543.

Is it unfair to ask, when was the thought of suicide conceived? Was it on Sunday afternoon when he was urging his friend Geagan to go fishing with him; was it Sunday night when he sat conversing with his friend Anderson until 10:00 p. m.; was it Monday morning when he told his wife he was going fishing; was it while he was eating his usual breakfast; was it while he was playing with his child and pal; was it while he was drying the dishes his little girl was washing, or was it subsequent to all of this? Finally, the question must not only be asked, but petitioner must answer why did Walter Gamer want to commit suicide? The record herein is barren of an answer to any of these questions; consequently, to contend that a verdict other than the one rendered, was proper would defy reason and ignore the facts.

In this connection we desire to quote from the facts in

Pythian Knights Council vs. Beck, 181 U. S. 49.

"The deceased and his wife had been married some six years. They had one child, a little girl, of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable, and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic who had worked in the family for two or three years, but had left a year and four months before his death, that when once she called his attention to the fact that he was drinking heavily his

reply was that 'a man that has as much trouble as he had, the sooner the end came the better,' and a similar remark at another time, that such a man 'would be better off dead than living.' Two days before his death his wife left her home and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking. There were two guns in his house, one a single-barrel shotgun, belonging to his wife, and one a double-barrel shotgun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hack driver who had brought the policeman called out that the deceased had gone into the back yard and into a water closet. The hack driver heard him go into the closet, and after a minute or so heard him step outside, and immediately the gun was discharged, and on examination he was found with the upper part of his head blown off. It was so dark that no one saw the circumstances of the shooting. Whether it was accidental or intentional is

a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a drunken man, stumbled and fell against it, is a matter of conjecture."

The Court will observe that such facts very strongly indicated suicide; nevertheless, this Court held:

> *"At any rate, the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the Court of Appeals, we are not justified in disturbing it."* (Italics supplied.)

In

Home Benefit Association vs. Sargent, 142 U. S. 691, 697, 701,

the facts were, deceased had been found with a bullet wound in his right temple, lying upon the bed with the clothes drawn up under the armpits, his limbs relaxed, no evidence of any struggle, and within a few inches of his right hand a pistol with three chambers discharged. The Court held the case was properly submitted to the jury and a judgment for the beneficiary affirmed.

The Court in the above case instructed the jury as follows:

> "The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is

void. If he died in some other way—by accident or assassination—it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defense. * * * When the policy of insurance was introduced with the evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into court, and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defense, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff, that the defense has been established."

In the opinion is announced the following rule:

"The defendant having alleged in its answer that Hall's death was due to one of the causes excepted from the operation of the policy, it was not error for the Court to charge the jury that the defendant was bound to establish such defense by evidence outweighing that of plaintiff."

We have quoted at length from the two foregoing cases because they are decisions of this Court; also because the facts in each were strongly indicative of suicide, notwithstanding which that question was held to have been properly submitted to the jury.

The authorities seem to be in agreement upon the following propositions of law:

"The law presumes that all men are sane, and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death."

"The above presumption in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self-destruction and to cast upon the defendant the burden of producing evidence on the point."

See

37 C. J. 618 (415).

Also

"Where it is doubtful from the evidence that death was caused by an accident or by suicide, a presumption arises that an accident and not suicide was the cause of death."

14 R. C. L., Sec. 416, p. 1236.

See

22 C. J. 95 cited in
Conn. Life Co. vs. Maher, 70 Fed. (2d) 441.

In

Cooley's Brief on Ins. Vol. 6 p. 5454

we find the following:

"When the circumstances of death are such that it might have resulted from negligence, accident or suicide, the presumption is against death by suicide."

And on page 5460 we find the following:

"The defense relied on by appellant in this case is suicide or self-destruction and is an affirmative one, and the burden of proof is on appellant to show that the deceased intentionally took his life."

In each instance many authorities are cited in support of the text.

It is generally held, that the defense that death resulted from causes which by the terms of the policy relieved the insurer from liability thereunder, is a matter of affirmative defense, to be alleged by insurer in its answer.

This was an action on double indemnity on life insurance policies, where the insurance was reduced by one-half if the insured was employed in an underground mine. The point raised was that the complaint should have negatived such employment, but the complaint was held good, the burden being on the defendant to bring the case within the terms of the policy partially relieving it of liability.

Sullivan vs. Metropolitan Life Ins. Co., 96 Mont. 254, 266; 29 Pac. (2d) 1064.

Same rule is followed in,

Kingsland v. Metropolitan Life Ins. Co., 97 Mont. 558, p. 569, 37 Pac. (2d) 335.

In the following cases it is held that suicide is an affirmative defense, which must be pleaded by defendant in its answer to be available.

Vicars v. Aetna Life Ins. Co. (Ky.), 164 S. W. 106; 158 Ky. 1;

Dent v. National Life & Acc. Ins. Co. (Tex.) 6 S. W. (2d) 195;

American Central Life Ins. Co. vs. Alexander (Tex.), 39 S. W. (2d) 86.

It is for the jury to decide whether death was accidental, as neither suicide nor murder will be presumed

from the killing of an individual by gunshot wound.

McClur vs. N. Y. Life Ins. Co. (Dist. Ct. La.), 50 F. (2d) 972.

We now invite the Court's attention to three cases from the Ninth Circuit, wherein the question of suicide or accidental death was considered, and in which cases the Court held that the question was for the jury. The first case is

Metropolitan Life Ins. Co. v. Broyer, 20 Fed. (2d) 818, 820.

This is a case wherein the facts disclosed death was caused by asphyxiation. Judge Hunt in his decision used the following language so pertinent here.

> "The jury may have inferred that Broyer, while at the telephone, nervously reached up, and without meaning to do so, turned on the gas cock; or, that in pulling the telephone directory, which hung on the gas jet, he may have turned on the cock; or, that in going to the basin he may have staggered and laid hold of the jet and unintentionally turned on the cock; or that his senses may have been so muddled that he turned on the cock, believing it was the switch for the electric lights, any one of the circumstances enumerated is inferable, and warrants the conclusion that the gas cock was opened by Broyer with no intention of turning on the gas."

The next case in which the questions of law here involved were considered, is

Wells Fargo Co. vs. Mutual Life Ins. Co., 66 Fed. (2d) 890, 893,

in which case death also resulted from asphyxiation caused by monoxide gas. The District Court directed judgment for defendant, which judgment, in a decision by Judge Garrecht, was reversed and the case remanded for a new trial.

The decision cited with approval Metropolitan Life Ins. Company vs. Broyer, also the decision in the case of

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661.

The last case decided in the Ninth Circuit is the case of

Connecticut Life Ins. Co. vs. Maher, 70 Fed. (2d) 441;

and is the last expression by said Circuit Court upon the questions here involved. Judge Norcross, in his opinion, quotes extensively from the case of

Pythian Knights vs. Beck, 181 U. S. 49.

The facts in the Maher case disclose that decedent came to her death by falling to the pavement from the sixth floor of an apartment house. Decedent had been very nervous and much upset and upon numerous occasions had threatened suicide saying:

"Well, I will end it all." "I am going to finish this business, going to kill myself."

Other testimony disclosed a chair near the window from which the deceased fell or jumped. There were foot prints and finger prints on the window sill, the finger prints being of a sliding nature as if someone hung on the outside thereof and were on the outside

of the ledge, as was a foot print. Upon the day in question the fleet was coming into the bay of San Francisco.

The Court in concluding that the case was one for the jury and that a verdict for the plaintiff should be affirmed, said:

"Unless there is no reasonable hypothesis other than suicide to be deduced from the evidence submitted, the question of the occasion of death by accidental means remains one for the jury to determine."

The Court in its decision commented upon the following facts:

"With the possible exception of a hat the deceased was fully dressed for leaving the apartment, if such may have been her purpose. She left no written notes, or messages, which not infrequently is the act of one about to commit suicide." (Italics supplied.)

We quote the foregoing language because it is so very pertinent to the facts herein.

We now urge that the testimony offered by petitioner upon this trial is no different from that produced upon the first trial (opinion by Judge Denman, 328 R.), but is sadly lacking in its attempt to establish that the death of Walter Gamer was due to suicide.

The testimony of the additional witnesses produced by petitioner upon the second trial was cumulative, it consisted of expert testimony, the effect and value of which we have already discussed, and while it served to increase the volume of testimony, it did not change the fact situation from that which existed at the time of

the first appeal and decision of the Circuit Court of Appeals herein.

Gamer vs. New York Life Ins. Co., 76 Fed. (2d) 543.

We therefore contend the decision upon the first appeal becomes the law of the case, is controlling herein and binding upon this appeal. Petitioner has had his day in court. Insofar as the additional testimony is concerned we again refer to the fact that petitioner upon the former trial had available to it, but failed to use the witness McNeil. (222 R.)

That the decision upon the first appeal is now the law of the case we invite attention to the following cases:

Maryland Casualty Co. vs. City of South Norfolk, 54 Fed. (2d) 1032, 1039;

Minneapolis Steel & Machinery Co. vs. Federal Surety Co., 34 Fed. (2d) 270;

City of Seattle vs. Puget Sound Power & Light Co., 15 Fed. (2d) 794;

Cheasapeake & D. Ry. Co. vs. Mears, 70 Fed. (2d) 490;

Roberts vs. Cooper, 20 How. 467, 481, 15 L. Ed. 969;

U. S. vs. Axman, 193 Fed. 644;

Bodkin vs. Edwards, 265 Fed. 621;

Freeman vs. Smith, 62 Fed. (2d) 291;

General Motors Acceptance Corp. vs. Chev. Co., 74 Fed. (2d) 386;

Clairborne-Reno Co. vs. Du Pont Co., 77 Fed. (2d) 565;

Penn. Mining Co. vs. United Mine Workers, 28 Fed. (2d) 851;

Aetna Life Ins. Co. vs. Wharton, 63 Fed. (2d) 378;

Messinger vs. Anderson, 225 U. S. 436, 56 L. Ed. 1152;

Zurich G. A. & L. Co. vs. O'Keefe, 64 Fed. (2d) 768;

American Surety Co. vs. Bankers Savings & Loan Ass'n., 67 Fed. (2d) 803;

Jones vs. Box Elder County, 67 Fed. (2d) 900.

See also

Solberg vs. Sunburst Oil Co., 73 Mont. 94, 235 Pac. 761.

Anderson vs. Border, 87 Mont. 4, 285 Pac. 174;

Carlson vs. N. P. Ry. Co., 86 Mont. 78, 281 Pac. 913.

In the case last above cited the Supreme Court of Montana said:

> "While it is true that the volume of testimony introduced by the defendants on the second trial appears to be somewhat augmented, its legal effect is still the same, viz., such as to create a direct conflict usually presenting a problem for the jury to solve."

Upon the second appeal the Circuit Court of Appeals again held the evidence sufficient to warrant the action being submitted to the jury,

Gamer vs. N. Y. Life Ins. Co., 90 Fed. (2d) 817,

which, in connection with the verdict of the jury and the denial by the trial court of petitioner's motion for a new trial, should preclude petitioner from now asserting in this Court that the verdict was not justified.

"The right to limit liability turns upon whether such neglect was with the owner's privity or knowledge. Both courts below, after painstaking examination of the evidence, found there was such privity of knowledge and accordingly ruled that the claim for limits must be denied. We accept this concurring finding. There was sufficient evidence to support it."

Kellogg and Son vs. Hicks, 285 U. S. 502, 510, 76 L. Ed. 903, 911.

A verdict will be upheld if there is evidence which tends to sustain it.

U. S. vs. Copper Queen Min. Co., 185 U. S. 495; 46 L. Ed. 1008.

A verdict for plaintiff in an action for death should not be set aside on appeal for lack of evidence, unless under the testimony no recovery could be had on the facts shown in any view which could properly be taken of them.

Myers v. Pittsburgh Coal Co., 233 U. S. 184; 58 L. Ed. 906.

Conflicting evidence will not be weighed by the Supreme Court, and it will only determine whether there is sufficient evidence to sustain the verdict.

Troxell vs. Del. L. & W. Ry. Co., 227 U. S. 434; 57 L. Ed. 586.

Jury's finding on facts will stand unless reasonable men in exercising unprejudiced judgment would draw opposite conclusion from facts.

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544.

Whether defendant's negligence was the immediate cause of the injury will not be passed on by the United State Supreme Court where there was evidence justifying the verdict.

Panama Ry Co. vs. Bosse, 249 U. S. 41; 63 L. Ed. 466.

Judgment will not be reversed where the conclusion was twice reached by the Circuit Court of Appeals that the evidence supports the verdict.

Chesbrough v. Woodworth, 244 U. S. 72; 61 L. Ed. 1000.

The concurrent findings of a federal District Court and the Circuit Court of Appeals that the verdict is supported by the evidence will be accepted by the United States Supreme Court unless clear error is shown.

C. R. I. & P. R. Co. v. Collins Products Co., 249 U. S. 186; 63 L. Ed. 552;

El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608, 53 L. Ed. 348;

Baugham v. N. Y. P. & N. Ry. Co., 241 U. S. 237, 60 L. Ed. 977.

WERE THE COURTS' INSTRUCTIONS ERRONEOUS?

The instructions having been set forth at some length in the brief of petitioner, we shall refrain from any repetition. We do, however, invite the Court's attention to the following portion of the Court's instructions:

> "Boiled down to its final essence, that is the question that you are called upon to decide,—Did Walter Gamer kill himself intentionally, and if Walter Gamer did not kill himself intentionally, this woman is entitled to $20,000.00—and if he did intentionally kill himself she is not entitled to any amount in excess of $10,000.00."

No instruction could more definitely inform the jury that the only issue for them to decide was, did or did not Walter Gamer commit suicide?

It will be observed that petitioner in their brief attempt to have this Court disapprove the rule heretofore announced in

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661.

The cases in which it is claimed this Court disapproved of the ruling in the McConkey case are found on page 59 of petitioner's brief. *In none of these cases was the decision or rule announced in the McConkey case considered.*

In this connection we invite the Court's attention to the fact that the first of these cases, the so-called Turnipseed case, was decided December 19, 1910, while the last of these cases, Del Vecchio vs. Bowers, was decided December 9, 1935. Petitioner's brief in the Circuit Court of Appeals was served on July 7, 1936, and no reference is found in said brief to any of these cases except the Turnipseed case, which is referred to only because it is cited in a Circuit Court of Appeals decision. We regard this as of some significance, particularly as it is now urged with much force that said decisions, each and all,

overrule the rule announced in the McConkey case. No such contention was made until after the decision of the Circuit Court of Appeals herein. If their contention was meritorious would the able counsel representing petitioner have overlooked calling said cases to the Court's attention? It is our contention that the decision in

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661,

is a correct statement of the law and has been so regarded during the many years intervening since the date of its rendition. The Court will observe from a comparison of the instructions given in the instant case with those in the McConkey case that the instructions here given were copied almost verbatim from those expressly approved in the McConkey case. Counsel for petitioner in their brief quote the first paragraph of the decision by Mr. Justice Harlan in that case, and from said paragraph seek support for their position herein. However, we invite the Court's attention to the following, likewise from that case, and being extracts from the instructions given therein.

> "The plaintiff exhibits the policy in evidence and gives evidence of the fact that the insured was found dead, within the life of the policy, from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by 'external and violent means,' and the only question is whether the means by which he came to his death were also 'accidental.' It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast, and so uniform the efforts of men to preserve their existence, that

suicide cannot be presumed. The plaintiff is therefore entitled to recover *unless the defendant has by competent evidence overcome this presumption, and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.*" (Italics supplied.)

"The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant. (Italics supplied.) The presumption is that the death was not voluntary. "The court also said: "In order, therefore, to sustain the plea of suicide, the defendant must have given to the jury evidence sufficient to overcome the presumption to which I have referred, and to convince the jury that the injury from which the insured died was voluntary or intentional on his part."

And further, the Court in its opinion said:

"Did the Court err in saying to the jury that upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? That question must be answered in the negative. (Italics supplied.) The condition that direct and positive proof must be made of death having been cause by external, violent and accidental means, did not deprive the plaintiff when making such proof, of the beenfit of the rules of law established for the guidance of courts and juries on the investigation and determination of facts."

The next case from this Court in which the question here involved was decided was the case of

Home Benefit Association vs. Sargent, 142 U. S. 691, 25 L. Ed. 1160,

in which the Court instructed the jury as follows:

"The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is void. If he died in some other way—by accident or assassination—it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance or proof of the truth of this defense, * * * When the policy of insurance was introduced with evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into court, and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defense, the onus is upon the defendant to satisfy you by evidence which, in your judgment, outweighs the evidence of the plaintiff, that that defense has been established."

While it is true that said action was on a policy of life insurance containing certain exceptions in case of suicide, the language of the Court is nevertheless applicable herein.

Before entering into a discussion of the decisions of this Court which it is claimed by petitioner overrule the rule announced in the McConkey case, we suggest that none of said cases involve life or accident insurance, and reiterate that in none of said cases is the McConkey case considered or the rule there announced modified, disapproved or reversed. In this connection, we invite attention to the following well defined rules of law:

"A case is not overruled by an omission to mention it."

U. S. vs. Moreland, 258 U. S. 433, 436.

"The general language of a judicial opinion must be taken in connection with the point actually decided."

Sterling vs. Constantin, 287 U. S. 378.

"Always the language used in an opinion must be *read in the light of the issues presented.*" (Itlics supplied.)

Sinclair vs. U. S., 279 U. S. 479.

We also invite the Court's attention to the following from Judge Denman's decision herein:

"In refusing to accept such a silent submersion of the prior decision in the McConkey case, we are moved by the confusion into which the litigants and the legal profession would be thrown if the Supreme Court is deemed to overrule while it avoids the mention, much less the consideration of, a case which long ago established and has maintained a rule of law upon which they relied." (340, 341 R.) (Italics supplied.)

To supplement said statement may we ask, what would be the result if trial courts were put in error because of the giving of instructions theretofore definitely and expressly approved by this Court?

To now reverse the rule announced in the McConkey case would create a condition of uncertainty in the minds of trial judges and counsel, resulting in such confusion as to seriously hinder and delay litigation.

To review in detail the decisions of this Court relied upon by counsel for petitioner would unduly prolong this brief. Each of these cases were reviewed and dis-

tinguished by Judge Denman in his very able opinion herein.

Gamer vs, N. Y. Life Ins. Co., 90 Fed. (2d) 817.

There is not much we can add thereto. We believe his reasoning unanswerable, his interpretation of the various decisions in accord with well recognized rules and his conclusion as to the effect and intent of said decisions irrefutable.

A brief review of the cases relied upon by counsel for petitioner will now be indulged in. In the case of

Mobile, Jackson and Kansas City Railroad vs. Turnipseed, 219 U. S. 35, 55 L. Ed. 78,

this Court was called upon to consider the constitutionality of a law passed by the legislature of the State of Mississippi, which provided as follows:

> "In all actions against railroad companies for damages done to persons or property, proof of injuries inflicted by the running of the locomotives or cars of such company, shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury."

This Court upholding said statute said:

> "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue, is but to enact a rule of evidence."

Whatever else is stated in said decision insofar as it pertains to the effect of a presumption must be held to

apply to the facts as therein presented and to relate only to the question as to whether or not a statute such as there involved violated certain constitutional provisions.

The Court did not therein consider the decision in the McConkey case.

In the case of

Atlantic Coast Line vs. Ford, 287 U. S. 502, 77 L. Ed. 457,

this Court, considering the presumption there under consideration, said:

> "Such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence."

As was pointed out by Judge Denman in his opinion referring to the above decision:

> "This distinction is summarized in Atlantic Coast Line R. Co. vs. Ford, 287 U. S. 502, 506, 53 S. Ct. 249, 250, 77 L. Ed. 457. There the Court compares the presumption casting the burden of proof on the party against whom it is raised in the case of Western & Atlantic R. R. v. Henderson, 279 U. S. 639, 643, 49 S. Ct. 445, 447, 73 L. Ed. 884, with the presumption which vanishes when the party against whom it exists goes forward with evidence tending to overcome it, recognized in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.), 226, Ann. Cas. 1912A, 463. The summary of the Henderson case is as follows: 'Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary in-

> ference of fact that *vanished* upon the introduction of opposing evidence. * * * That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail *unless such testimony is found* by the jury to preponderate.'" (Italics supplied.) (336, 337 R.)

The McConkey case was not considered in said decision.

In

> Western & Atlantic R. R. Co. vs. Henderson, 279 U. S. 639,

the question involved the constitutionality of a statute making a railroad company liable for damages to persons or property by the running of its locomotives or cars or other machinery * * *, unless the company made it appear that their agents have exercised all ordinary and reasonable care and diligence, *the presumption in all cases being against the company.* (Italics supplied.) During the trial of the action it appears from the opinion

> "Defendant offered much evidence tending to show that it and its employees exercised due care for the proper maintenance of track and crossing and in the operation of the train, and that neither it nor any employee was guilty of any negligence charged."

The Court in its opinion held:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

The Court distinguished the statute under consideration from that considered in the Turnipseed case and held that the Mississippi statute created merely a temporary inference of fact which vanished upon the introduction of opposing evidence, while the Georgia statute imposed the burden of proof upon the railroad unjustly, and in violation of the Fourteenth Amendment. It will thus be seen the above case cannot be reasonably claimed to be authority for petitioner's contention herein. Furthermore, *the McConkey case was not considered or mentioned.*

The next case cited is that of

Heiner vs. Donnan, 285 U. S. 312, 76 L. Ed. 772.

The Court had under consideration the effect of a statute which provided that any transfer made by a decedent within two years prior to his death shall be deemed and held to have been made in contemplation of death within the meaning of the act in question, and any transfer of a material part of his property during said time shall, unless shown to the contrary, be deemed to have been made in contemplation of death. The Court held that the statute in question created a conclusive presumption incapable of being overcome by proof of the most positive character. The Court, in refusing to uphold the constitutionality of said section, considered the effect of presumptions, rebuttable and conclusive ones, and in the course of its opinion said:

> "A rebuttable presumption clearly *is a rule of evidence which has the effect of shifting the burden of proof.*" (Italics supplied.) (329 R.)

Thus it will be seen that this case sustains the position of respondent rather than that of the petitioner. In any event, that case likewise does not consider the decision in the McConkey case. See also

Lilienthal vs. U. S., 97 U. S. 237, 24 L. Ed. 901.

The last expression by this Court upon the question here involved is found in the case of

Del Vecchio vs. Bowers, 296 U. S. 280, 80 L. Ed. 229,

involving consideration of a section of the Longshoremen's and Harbor Workers' Compensation Act, U. S. C. A. Title 33, which created a presumption that the death of an employe was not suicidal. In the opinion written by Judge Denman in this case he considered the above case and quoted from the statute involved as follows:

> "In any proceeding for the enforcement of a claim for compensation, * * * it shall be presumed, *in the absence of substantial evidence to the contrary*—
>
> "(a) That the claim comes within the provisions of this chapter.
>
> "(b) That sufficient notice of such claim has been given.
>
> "(c) That the injury was not occasioned solely by the intoxication of the injured employee.
>
> "(d) That the injury was not occasioned by the wilful intention of the injured employee to injure or kill himself or another." (Italics supplied.)
>
> 33 U. S. C. A. 920.

The peculiar language of the statute will be noted. It is that death otherwise than by suicide "shall be presumed, in the absence of substantial evidence to the contrary." The Court holds that, where there is no "absence" but *presence* "of substantial evidence to the contrary," the presumption ceases to exist.

The Court confines it ruling to the limiting provision of the statute and is not ruling on the legal effect of the unrestricted presumption against suicide, stating (p. 286): "The *act under consideration,* however, does not leave the matter to be determined *by the general principles of law, but announces its own rule* * * *." (Italics supplied.) Certainly this has no application to a policy which specially *excepts* liability for suicide in the clause reading:

> "Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane;"

The presumption against suicide in the McConkey case is not of the character of the one created by the peculiar words of the statute of the Del Vecchio case. It is not controlled by the limiting words of the statute. Congress is dealing solely with employers' liability and its provisions for that statute cannot be construed as declaring a new rule of presumption in insurance cases. Under the McConkey case the presumption is one which continues to exist in the presence of evidence to the contrary of which there must be a "preponderance" produced by the insurer to overcome it. (339, 340 R.)

The Court, in the Del Vecchio case, supra, *does not mention the McConkey case.*

In addition to what has already been said regarding these cases, we respectfully invite the Court's attention to the decision of Judge Denman upon the appeal in this case,

90 Fed. (2d) 817 (336, 341 R.),

which clearly demonstrates that the foregoing decisions are not in conflict with the rule announced in the McConkey case; in fact make no mention of the decision in that case.

In concluding our review of said decisions may we again urge that the language used by the Court in the foregoing cases must be held to apply to the facts as therein presented.

> "The language of an opinion must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the case and which was decided."
>
> East Tennessee Company vs. I. C. C., 181 U. S. 1.

> "General principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case."
>
> Parsons vs. District of Columbia, 170 U. S. 45.

Counsel rely with great force upon the case of

Jefferson Standard Life Ins. Co. vs. Clemmer, 79 Fed. (2d) 724.

We concede that Judge Soper gave much consideration to the question here involved. We do not and cannot agree that he was justified in refusing to follow the

decision in the McConkey case. In the first place, in the Clemmer case the facts definitely established that the decedent had committed suicide. More than one motive therefor was apparent from the evidence—he had been drinking and was likewise suffering financial difficulties, thus, on the facts distinguishing that case from the case at bar.

In his decision Judge Soper admits that it is in conflict with the rule in the McConkey case, but attempts to justify its departure by the following statement:

> "The case, therefore, has not uniformly been recognized as binding authority for the rule that the burden of proof is upon the defendant."

True, some Circuit Courts of Appeal have refused to follow the rule in the McConkey case, but were such Courts justified in their refusal; by what right did they ignore or refuse to follow the McConkey decision? In the case at bar both the District Court and Circuit Court of Appeals chose to and did follow the law as announced in the McConkey decision. Were they in error in so doing? We do not believe this Court is inclined to encourage either District or Appeals Courts in an urge to overrule the decisions of this Court.

The fallacy of the reasoning therein may perhaps be best illustrated by a review of two decisions cited therein and stated to announce a rule of law at variance with the rule in the McConkey case. We refer to the cases of

Holt vs. U. S., 218 U. S. 245, 253,

and

Agnew vs. U. S., 165 U. S. 36.

A reading of these cases will disclose that neither is an authority for the position of the learned judge who wrote the decision in the Clemmer case.

In the Holt case the defendant requested an instruction that the law presumed the defendant innocent, and added:

> "This presumption of innocence is evidence in the defendant's favor."

Mr. Justice Holmes held that the trial judge had correctly informed the jury regarding the presumption of innocence which surrounded the defendant, and in the course of his opinion stated that the concluding sentence of the tendered instruction would have a tendency to mislead the jury.

In the Agnew case an instruction was tendered by the defendant regarding a presumption, the concluding sentence of which was:

> "This presumption is to be treated by you as evidence, giving rise to resulting proof to the full extent of its legal efficacy."

and Mr. Chief Justice Fuller said that the tendered instruction had been covered by instructions given and might well have been refused because of the tendency of its closing sentence to mislead. Thus it will be seen that neither of these cases are authority for the position assumed by Judge Soper in his contention that said decisions at least impliedly justified the conclusion that this Court was departing from the rule announced in the McConkey case. In neither case was the McConkey decision considered.

Furthermore, in

Heiner vs. Donnan, 285 U. S. 312,

already referred to, this Court announced that a rebuttable presumption is a rule of evidence which has the effect of shifting the burden of proof, thus again placing this Court in disagreement with the decision in the Clemmer case.

We concede that in some of the decisions cited by counsel for petition some Circuit Courts of Appeal have not followed the decision in the McConkey case. We believe that the language of the Court in

New York Life Insurance Co. vs. Ross, 30 Fed. (2d) 80;

Certiorari denied N. Y. Life vs. Ross, Exec., 279 U. S. 852,

speaks far more eloquently than would or could any language of ours in refutation of the right of District or Circuit Courts to refuse to allow the rule announced in the McConkey case. Therein it is said:

> "The charge to the jury in the court below was manifestly carefully prepared with these authorities in mind. *So far as we are advised, the McConkey case has never been qualified nor overruled in this circuit. The former is binding upon this court, and both were binding upon the District Court.* (Italics supplied.) The doctrine announced in both thus becomes the law of all cases presenting the identical question. The situation is a most appropriate one for application of the doctrine of stare decisis. If this doctrine means, as was said in the Madrid (C. C.) 40 F. 677, 679, *'That when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases,'*

precedents which cannot be distinguished should be followed until modified or overruled, and the interests of uniformity, certainty, and stability in the law thus promoted. (Italics supplied.) Certainty of a rule is often of equal importance with theoretical accuracy.

"We are unable to satisfactorily distinguish the case of Travelers' Ins. Co. vs. McConkey in the Supreme Court, or more especially Standard Life, etc. Co. v. Thornton, in this Circuit, from the present action, and although, except for these cases, the charge would not seem to us properly to apply the abstract principle of law, we cannot say that the Court erred in following the doctrine announced in the decisions.

The judgment must therefore be affirmed."

In a concurring opinion by Circuit Judge Dennison, he said:

"In this case, as in the McConkey case, it seems to me that, in spite of the protestations to the contrary, the burden of proof—the risk of nonpersuasion—was shifted to defendant. As I read the charge of the trial court in the McConkey case, it was that the burden of proof to show accident, rather than suicide, was on the plaintiff, but that if the evidence of each was equally balanced, 'the law was for the plaintiff.' The Supreme Court approved both of these conclusions, plainly not regarding them as inconsistent; but the conflict of view revealed by the cases cited in Judge Hickenlooper's opinion shows that the two conclusions are not easy to reconcile."

In

Standard Life and Accident Co. vs. Thornton,
100 Fed. 582,

Judge Day, later Mr. Justice Day, in discussing the presumption against suicide, said:

"This presumption must stand in the case, and be decisive of it, until overcome by testimony which shall outweigh the presumption. *It casts upon the defendant who claims that the death was intentional the burden of establishing it by a preponderance of testimony.*" (Italics supplied.)

Counsel next cite the cases of

Travelers' Insurance Co. vs. Wilkes, 76 Fed. (2d) 701, 705;

Fidelity and Casualty Co. vs. Driver, 79 Fed. (2d) 713;

New York Life Ins. Co. vs. Trimble, 69 Fed. (2d) 849.

In none of these cases was the McConkey case considered. The facts in each showed definitely that the decedent committed suicide. In the Wilkes case the facts showed that the weapon used was held against or very close to the head, more than one shot was fired by the decedent, "the cabin walls showed the marks of another bullet. At the beginning of the year the decedent had been sued by his wife for divorce she alleging intoxication and cruel treatment. On the Saturday before his death the insured had been drinking. On the Tuesday and Wednesday before his death he did not appear for work. He stayed in his cabin Tuesday night, Wednesday and Wednesday night sent his servant to get two pints of whiskey. After his death two empty pint bottles and an empty quart bottle, which had contained liquor were found in his room. A few days before his death, in discussing a case of disappearanee, decedent had said in substance; the only way to disappear

was to blow one's brains out. The muzzle of the gun was against the head of the insured or too near it even to burn the hair and he was prone on the bed when the fatal shot was fired."

In view of the foregoing facts, the Court in its opinion said:

> "The two shots, whether the other one followed immediately or was fired previously, cannot be accounted for by any reasonable theory of two unintended discharges. Under the evidence in the record no reasonable conclusion can be reached other than that the insured was intentionally shot, either by his own or by some other person's hand."

It would seem unnecessary to further quote from said case in order to differentiate the facts therein from those in the case at bar.

This is likewise true of the case of

Fidelity & Casualty Co. vs. Driver, 79 Fed. (2d) 713.

Notwithstanding that the facts strongly suggested suicide, the Court nevertheless held that it presented a question for the jury under proper instructions. The case was reversed because of what the Court regarded as improper instructions.

In the Trimble case the decedent had prepared and sent in ahead of time a statement of salary to be due him for the unexpired first half of the month; he had remained alone in the office and killed himself after his companions left him, and while they were at supper he took the clip out of the pistol and laid it on the bed beside him, either for the purpose of taking no chances

of shooting himself more than once, or of creating an impression that his death was accidental. The pistol was held against or very close to his right temple. The Court held that such facts indicated suicide.

To review each case cited by counsel for petitioner in detail would serve no good purpose. We will not further prolong this brief by so doing. We do, however, desire to briefly review some of the former decisions of the Circuit Court of Appeals for the Ninth Circuit, which are relied upon by counsel for petitioner.

The first case cited is

United States F. & G. Co. vs. Blum, 270 Fed. 946,

which it is claimed is in conflict with the ruling in the case at bar. In that case a verdict for plaintiff was affirmed. There was no question involved regarding instructions. It is true that the McConkey case is cited, but the Court's construction of the rule announced by the McConkey decision shows that the Court of Appeals misconstrued the purport of that decision and is decision is in direct conflict with the rule therein announced.

The case of

Ariosi vs. Orient Ins. Co., 50 Fed. (2d) 548

is next cited. The decision therein was written by Judge Wilbur, and Judge Wilbur concurred in both decisions in the case at bar.

In the case of

New Amsterdam Casualty Co. vs. Breschini, 64 Fed. (2d) 887,

the opinion was written by Judge Wilbur *but did not mention or discuss the decision in the McConkey case.* The fact that the decision in the Breschini and Ariosi cases were written by Judge Wilbur, who concurred in the decision in the case at bar, indicates far more forcibly than any language of ours that he did not consider the law as therein announced in conflict with the rule announced in this case or with that announced in the McConkey case.

Judge Denman in the decision herein discusses somewhat at length some decisions from the Ninth Circuit, wherein the questions here involved were considered, including those decisions claimed by counsel for petitioner to be in conflict with the rule announced in the case at bar. We invite attention to that portion of the decision where such discussion is had. (333, 336 R. Inc.) It is an effectual answer to every contention of petitioner.

A comparatively recent case decided by the Supreme Court of Washington reviews a great many of the decisions in which the question of burden of proof is discussed. We refer to the case of

Selovers vs. Aetna Life Ins. Co., 38 Pac. (2d) 1059,

in which the Court, after an exhaustive review of the authorities, held that the burden of proof was on the *insurer.*

In 6 Cooley's Briefs on Insurance (2d Ed.), page 5454, under the title "Suicide As an Excepted Risk," the author states:

"As a defense based on the condition making suicide an excepted risk is an affirmative one, the *burden of proof that the insured committed suicide is on the insurer.*" (Italics supplied.)

See

37 C. J. 618 (415).

The authorities seem to be in agreement upon the following propositions of law;

"The law presumes that all men are sane, and possessed of the love of life; are animated by the instincts of self preservation and the natural desire to avoid presonal injuries and death.

"The above presumption in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self-destruction and to cast upon the defendant the burden of producing evidence on the point."

See

Fidelity Co. vs. Weise, 55 N. E. 540, 541; 182 Ill. 496.

It is likewise held by the overwhelming weight of authority, that

"Where a person came to death by violence and it might have resulted from accident, homicide, negligence, natural causes, or suicide, the presumption is in favor of death by one of such other causes and against death by suicide. Therefore the burden of proving death by suicide as a defense is on defendant."

See

37 C. J. 618 (415)

Also

"Where it is doubtful from the evidence that death was caused by an accident or by suicide, a presumption arises that an accident and not suicide was the cause of death."

14 R. C. L., Sec. 416, p. 1236.

See also

22 C. J. 95 cited in
Con. Life vs. Maher, 70 Fed. (2d) 441.

A very recent case is

New York Life vs. Miller, 81 Fed. (2d) 263 (decided Dec. 9, 1935),

in which the Court of Appeals for the District of Columbia says:

"It is settled law that a suicide clause in a policy of insurance must be given effect according to the terms of the contract, but, being an affirmative defense, the burden of proof is upon the insurance company, and the evidence on this point must outweigh the evidence of the plaintiff."

We have not attempted to review all the authorities in which this question has received consideration. To do so would unnecessarily extend this brief.

The policy here in question was made and delivered in Butte, Montana (See Par. 3 of Comp. and Par. 1 of Answer) (4, 26 R.).

Section 725 U. S. C. A. Title 28 provides:

> "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The statutes of Montana may therefore be helpful and we shall now proceed to invite the Court's attention to such statutes which we regard as being in point, their construction, as well as certain decisions of the Montana Supreme Court which we regard as being in point.

The Montana statute provides for certain disputable presumptions, one of which is: "A person takes ordinary care of his own concerns."

Sec. 10606 (28) Rev. Codes of Mont., 1935.

The Montana Code defines a presumption as follows: "A presumption is a deduction which the law expressly directs to be made from particular facts."

Sec. 10602 Rev. Codes of Mont. 1935.

The Supreme Court of Montana in considering the foregoing presumption, said:

> "While this is a disputable presumption, it has the *effect of evidence.*" (Italics supplied.)
>
> State vs. District Court, 72 Mont. 213, 232 Pac. 201, 203 (3).

In

> Arnold vs. Genzberger, 31 Pac. (2d) 296, 305 (14)

it is said:

"The burden of proving ratification was upon the plaintiffs throughout the case, for the burden of proof, when once determined, is not changed in any aspect of the cause, *except by legal presumption,* and this burden remains throughout the trial." (Italics supplied.)

Citing 2 Jones on Ev. (2d Ed.) 859.

A statutory disputable presumption is satisfactory if uncontradicted.

Renland v. First National Bank, 90 Mont. 424, 4 Pac. (2d) 488.

The statute commands that it must be followed if uncontroverted.

Sec. 10604, R. C. M. 1935.

Whether sworn testimony to the contrary is sufficient to rebut such a statutory presumption is a question for the triers of fact to determine, except where the facts proved are overwhelming against the presumed facts and permit of but one rational and reasonable conclusion.

Renland v. First National Bank, supra;

McMahon vs. Cooney, 25 Pac. (2d) 131, 95 Mont. 138.

Under the provisions of

Sec. 10600, R. C. M. 1935,

"A presumption is indirect evidence." (Italics supplied.)

Sec. 10604, R. C. M. 1935, provides:

> "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; *but unless so controverted, the jury are bound to find according to the presumption.*" (Italics supplied.)

In the case of

> Nichols vs. New York Life, 88 Mont. 132, 292 Pac. 253,

the Supreme Court of Montana said:

> "Plaintiff's contention is that there is a presumption against suicide and in favor of accident. While this is not one of the presumptions specifically mentioned in our statute, the adjudicated cases abundantly support the contention that such presumption exists."

And in the case of

> Maki vs. Murray Hospital, 7 Pac. (2d) 228, 232; 91 Mont. 251,

the Supreme Court of Montana, referring to presumptions said:

> "The explanation of the circumstances given by the defendant must be satisfactory to overcome the prima facie case made, and unless the evidence is such as to come within the rule in Nichols vs. New York Life Ins. Company, the question is clearly for the jury."

In the Maki case (above) the Supreme Court of Montana also announced the following rule in discussing the effect of a presumption:

> "Here, the law provides the plaintiff with a case on which he is entitled to recover, unless the defendant *explained away the presumed negligence.*" (Italics supplied.)

It will no doubt be conceded that where death was caused by violent and external causes plaintiff aided by the presumption against suicide has established a prima facie case in his favor.

In

State vs. Nielson, 57 Mont. 137, 187 Pac. 639,

it was held:

> "The testimony constituting a mere contradiction of the facts established presumptively by the prima facie case does not necessarily suffice to overthrow the same."

See also

10 R. C. L., p. 868.

In

Union Bank & Trust Co. vs. State Bank, 103 Mont. 260, 62 Pac. (2d) 677, 684,

the Montana Supreme Court said:

> "We recognize the rule that a presumption has the effect of evidence and that whether sworn testimony to the contrary is sufficient to rebut it is a question for the triers of fact."

Our code further declares:

> "The jury, subject to the control of the Court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions.
>
> They are not bound to decide in conformity with the declaration of any number of witnesses, which

do not produce a conviction in their minds, against a less number, or *against a presumption* or other evidence satisfying their minds." (Italics supplied.)

Sec. 10672 (2) R. C. M. (1935).

Our research does not disclose any interpretation of the foregoing statute by the Montana Courts, but California has an identical statute, and in a very early case had occasion to consider the effect of this provision in the case of

People vs. Milner, 54 Pac. 833, 837; 122 Cal. 171,

wherein it is said:

"By section 2061 of subdivision 2 of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the fact—*First, that a presumption is evidence; and, second, that it is evidence which may outweigh the positive testimony of witnesses against it.* It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled." (Italics supplied.)

The foregoing rule was quoted with approval in

Reclamation Dist. vs. Sherman, 105 Pac. 277, 285 (Calif.), 11 Cal. App. 399.

In

Standard Accident Co. vs. Kiker, 165 S. E. 850 (Ga.),

it is said:

> "There exists a strong presumption that a person found dead from gunshots died naturally or accidentally and presumption is against suicide."

In the case of

Smellie vs. So. Pac., 299 Pac. 529 (Cal.), 212 Cal. 540,

it was held:

> "Where a presumption arises in favor of a party which is not overcome by evidence produced and offered by that party, *it remains as evidence before the jury until a verdict is reached.*" (Italics supplied.)

We invite the Court's attention to the discussion contained in the Smellie case because of the very exhaustive review of the authorities regarding the weight to be given a presumption. In that case the Court holds that not only is a presumption evidence, but that in certain cases it may outweigh positive evidence adduced against the presumption.

If it be conceded, as it must be, that the law presumes Mr. Gamer did not commit suicide, it becomes essential to further consider what weight must be attached to this presumption.

The rule is probably best stated in the case of

Black vs. So. Pac. Co. (Cal.), 12 Pac. (2d) 981,

where the Court says:

> "Presumptions have the effect of evidence and, unless controverted, the jury is bound to find in accordance therewith."

And again in

Gray vs. Fred B. Neuhoff Co. (Cal.), 12 Pac. (2d) 1036,

it is stated:

"That a presumption constitutes evidence and may be considered as such by the Court is so well settled by recent cases that we do not need to cite them."

See

Graybill vs. Con. Ass'n., 60 Pac. (2d) 167 (Calif.).

There are many other cases to the same effect, but we content ourselves with citing the following cases sustaining the rules above quoted, viz:

Gayton vs. Pac. Fruit Express, 15 Pac. (2d) 217;

Reclamation District vs. Sherman; 105 Pac. 277;

Pitt vs. So. Pac. Ry. Co., 9 Pac. (2d) 273;

Grantham vs. Ordway, 182 Pac. 73, 76; 40 Cal. App. 758;

Olsen vs. Standard Oil Co., 204 Pac. 293; 188 Cal. 20;

Mar Shee vs. Maryland Casualty Co., 210 Pac. 269; 190 Cal. 1;

Stafford vs. Martinoni, 221 Pac. 919; 192 Cal. 724;

Re Jolly's Estate, 238 Pac. 353; 196 Cal. 547;

Gillilan vs. Portland Cremeation Ass'n., 249 Pac. 627 (Ore.), 120 Ore. 286.

In

Phillips vs. Cuccio, 442 Pac. (2d) 1050, 1051 (Calif.),

it is said:

> "Respondent rests his side of the question upon the claim that the ownership of the automobile by the mother raised a presumption that the son drove the machine with her consent and for her purposes, and that even in the face of contradictory testimony the court could, if it doubted the credibility of the testimony, base its finding upon the presumption alone. This view is sustained by Randolph vs. Hunt, 41 Cal. App. 739, 746, 183 P. 358; Hathaway v. Mathews, 85 Cal. App. 31, 39, 258 P. 712; Perry v. A. Paladini, Inc., 89 Cal. App. 275, 282, 264 P. 580; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747; Rapolla v. Goulart, 105 Cal. App. 417, 422, 287 P. 562; Bushnell v. Vashiro, 115 Cal. App. 563, 565, 2 P. (2d) 550, and Strasburger v. Prescott, 111 Cal. App. 104, 295 P. 357. To hold otherwise would be to say that a presumption ceases to exist whenever testimony in contradiction is received. Neither a court nor a jury is bound to decide in conformity with the testimony of witnesses and against a presumption. Code Civ. Proc. 2061, subd. 2.

WAS PETITIONER PREJUDICED?

If it should be held that the rule of law as announced in the McConkey case should be overruled we contend the judgment herein should nevertheless be affirmed for the following reasons, viz:

1. The evidence points irresistibly to the fact that the death of Walter Gamer was accidental; consequently,

upon neither the facts nor the law is petitioner entitled to prevail.

2. If the Court's charge as to the burden of proof was erroneous petitioner was not prejudiced thereby.

In support of the foregoing, we again invite a review of the evidence. This will demonstrate that viewing the evidence produced by petitioner in its most favorable light, it would not justify a finding that the death of Walter Gamer was due to suicide. Furthermore, nothing contained in the evidence produced by respondent would aid petitioner in its contention. The record herein conclusively establishes that the facts are inconsistent with suicide and consistent with accident.

We also urge an utter absence of any motive for suicide. As stated by Judge Wilbur upon the first appeal of this case: "Under the evidence the jury would have been justified in finding that there was *no motive for suicide.*" (Italics supplied.)

In

Tschubi vs. Met. Life Ins. Co., 72 Fed. (2d) 306,

it was said:

> "There is an entire absence of any motive for self-destruction. * * * While it is possible that the deceased committed suicide, *it seems unreasonable that he did without a motive to do so.*" (Italics supplied.)

See also

Conn. Life vs. Maher, 70 Fed. (2d) 441.

We come now to a consideration of the question as to whether or not petitioner was prejudiced by the charge of the Court, assuming for the sake of argument only, that the Court is no longer willing to follow the rule announced in the McConkey case.

Counsel for petitioner concede that the presumption that death was accidental was sufficient to compel it to "go forward with its proof." The Court having instructed the jury that the burden of proof was thereafter on petitioner, was this prejudicial error? We invite attention to the case of

> Smith vs. Hollander, 259 Pac. 958, 960; 85 Cal. App. 535,

wherein the Supreme Court of California in considering an instruction which said

> "After proof of plaintiff's prima facie case, the burden then shifts to the defendant to show she was not guilty of negligence."

held that

> "'Burden of proof' and burden of producing evidence' are not the same, but the use of the one expression instead of the other has been held not to be error."

In

> Hansen vs. Ore.-Wash. R. & Nav. Co., 188 Pac. 963, 970, 97 Oregon 190,

the Oregon Supreme Court said:

> "It is not improper to say that the 'burden of proof' shifts from one party to the other when that phrase is employed to express the idea that it is

incumbent upon a named party to *go forward with the evidence on a given question.*" (Italics supplied.)

In the instant case the burden of proof was, at the beginning of the trial, upon the respondent, who alleged in her complaint that death resulted from "bodily injury effected solely through external, violent and accidental means." (6 R.) The respondent produced proof that Walter Gamer's death was the result of bodily injuries effected through "external and violent means." The law thereupon aided respondent by the presumption that under such circumstances death was accidental. The Court instructed the jury regarding this presumption:

> "As I told you in the beginning the presumption is that he did not, and that presumption has the weight and effect of evidence and it is binding upon you and you must find according to that presumption until it is overcome by evidence, direct or indirect, that satisfies you that the presumption is not according to the fact."

With the foregoing instruction in mind we invite attention to the following statement by the Missouri Court of Appeals in

Stofer vs. Dunham, 208 S. W. 641, 644.

> "It is true the term 'burden of proof' has two meanings. By one of them is meant the obligation to establish the truth of a claim or a cause of action by a preponderance of the evidence, and this rests throughout on the party asserting it and never shifts;

by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial to make or meet a prima facie case. But as to negligence (which was only one of the necessary elements of plaintiff's cause of action), did not the establishment of the fact of a collision fulfill plaintiff's obligation in reference to the burden of proof, as used in the first sense above mentioned, unless the defendants were able to make the jury believe they were not negligent."

Said language is very pertinent to the facts here. The fact that death resulted from external and violent means, aided by the presumption, fulfilled respondent's obligation with reference to the burden of proof and the court's instructions, taken as a whole, so informed the jury.

To the same effect see

Alabama & V. Ry. Co. vs. Groome, 52 So. 703, 704 (Miss.).

In

Re Barber's Estate, 22 L. R. A. 90, 94, 63 Conn. 393,

it was said:

"The term 'burden of proof' is, after all, and no matter how important it has become through universal adoption and use, a mere form or figure of speech. Accordingly, as one view or another of its significance has been held, one style or the other of these seemingly inconsistent expressions has been used to denote entirely consistent meanings."

See also

Packard vs. O'Neil, 262 Pac. 881, 886 (Idaho).

We now invite the Court's attention to the fact that the rule announced in the McConkey case, either right or wrong, has been without modification since 1888. The policy here in question was executed on December 29, 1926. The policy having been written after the decision in the McConkey case, is it unreasonable to contend that the insurance company in writing it knew and had in mind said decision and the duty imposed upon the company in all cases where the question at issue was, did the insured die as a result of self-destruction or accident? It was within the power of the company to protect itself against the effect of the ruling in the McConkey case.

Bubany vs. New York Life Ins. Co., 51 Pac. (2d) 864, 871 (New Mex.).

Fidelity & Casualty Co. vs. Lowenstein, 97 Fed. 19, 38 C. C. A. 29.

In the foregoing discussion we have made no mention of objections to the right of petitioner to urge error in the giving of the Court's instructions. In view of the fact that these objections have been discussed at length in our brief heretofore filed herein in opposition to the granting of the Petition for Writ of Certiorari, we shall not indulge in any repetition of the argument therein advanced or the authorities cited. We believe such objections to have been meritorious and invite the Court's

attention to pages 18 to 25 of our former brief on file herein, wherein the authorities are collected in support of such objections.

We respectfully submit that the decision of the Circuit Court of Appeals herein was and is in accord with the law as announced in

Travelers' Ins. Co. vs. McConkey, 127 U. S. 661;

Home Benefit Association vs. Sargent, 142 U. S. 691;

Supreme Lodge Knights of Pythias vs. Beck, 181 U. S. 49,

and that the judgment herein should be affirmed.

As was said in

Gilman vs. Philadelphia, 3 Wall. 713

"A rule of law once vested by the Court should be firmly adhered to unless clearly erroneous."

In concluding our argument, may we urge the following:

Walter Gamer died April 10, 1933. He carried with the New York Life Insurance Company a policy of insurance containing the usual provisions regarding double indemnity. He paid $10.00 annually for this benefit. The Company refused to pay in excess of the face value of the policy. Suit was instituted on July 18, 1933. Upon the first trial the beneficiary was denied the right to have a jury determine the questions involved, with

the result that she was compelled to seek redress from the Circuit Court of Appeals.

Gamer vs. Prudential Life Ins. Co., et al., 76 Fed. (2d) 543,

which reversed the action of the trial judge and sent the case back for trial; trial was had, resulting in a verdict for the beneficiary. Motion for a new trial was denied; an appeal was again taken to the Circuit Court of Appeals for the Ninth Circuit, which upheld the verdict of the jury.

New York Life Ins. Co. vs. Gamer, 90 Fed. (2d) 817.

Thereafter this Court granted a Writ of Certiorari, and the case is now here for review. Almost five years have elapsed since the death of Mr. Gamer, during which time respondent's claim has not been paid, while litigation involving its payment continues. The Prudential Insurance Company, a party to the action at the time of the first appeal, having satisfied the claim of respondent, has not been involved either during the second trial or upon subsequent appeals.

If the rule in the McConkey case was not a correct expression of the law, and this, of course, we do not admit, should the beneficiary, respondent herein, be penalized by being compelled to again litigate this claim? We submit the rule in the McConkey case is a correct expression of the law and was followed by the trial judge in his instructions to the jury. If this Court should decide that the rule therein announced should be

modified or reversed, then we urge that a reading of the record herein will disclose that the evidence irrefutably points to death by accident; consequently, no prejudice was suffered by petitioner, and the judgment should be affirmed.

Respectfully submitted,

FRANCIS P. KELLY,

WILLIAM MEYER,
Butte, Montana,
Attorneys for Respondent.

CARL J. CHRISTIAN,
S. O. MEYER.
Of Counsel.

Service of the within and foregoing Brief by copy admitted this.....day of.....

.....

.....

.....

.....

Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 323.—October Term, 1937.

New York Life Insurance Company, Petitioner, vs. Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 14, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

April 10, 1933, the deceased died by gunshot. Petitioner had insured his life by a policy on which it agreed to pay his executors ten thousand dollars upon proof of death without regard to its cause, or twenty thousand dollars in case of death resulting from accident as defined by a provision the pertinent parts of which follow. "The Double Indemnity . . . shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means . . . Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane."

Respondent sued petitioner in a state court for twenty thousand dollars. There being diversity of citizenship, defendant removed the case to the federal court for the district of Montana. The complaint alleges that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and did not result from self-destruction but directly from the accidental discharge of a rifle.

Defendant's answer concedes that plaintiff is entitled to the face of the policy, and alleges a deposit of that amount with interest in court. It denies that death resulted from bodily injury effected through accidental means; and specifically denies that it resulted from the accidental discharge of a rifle or other fire-arm. And "as an affirmative defense," it alleges that the death of the insured resulted from self-destruction by intentionally discharging a loaded rifle into his body with intent to take his life.

The case came on for trial and, at the close of the evidence, the judge on motion of defendant directed the jury to return a verdict in its favor. Plaintiff appealed; the circuit court of appeals held that the question whether the death was accidental should have been submitted to the jury, and reversed the judgment. 76 F. (2d) 543. At the second trial plaintiff went forward; at the close of all the evidence defendant requested the court to direct a verdict in its favor, insisting that plaintiff had failed to prove accidental death and that the evidence showed death was caused by self-destruction, and was not sufficient to sustain a verdict for the plaintiff. The court denied the motion and submitted the case to the jury.

Its charge contained the following:

"In this case the defendant alleges that the death of E. Walter Gamer was caused by suicide. The burden of proving this allegation by a preponderance, or greater weight of the evidence, is upon the defendant. The presumption of law is that the death was not voluntary and the defendant . . . . must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary.

"Ordinarily . . . . in the absence of a plea by the defendant of suicide or self-destruction the burden would be upon, and it still is upon, the plaintiff in this case to prove that Walter Gamer died from external, violent and accidental means, but by its answer . . . the . . . Company has admitted that . . . [he] died through external and violent means. . . . The question remains as to whether the death was accidentally caused, or the means of the death was accidental or whether it was suicide. But when the defendant took the position that it takes here it assumed the burden of proving to you by a preponderance of evidence that Walter Gamer killed himself voluntarily. . . .

"The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide . . . must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary . . . ."

The jury gave plaintiff a verdict for twenty thousand dollars with interest, and the court entered judgment in her favor for that amount. Defendant appealed, alleging that the trial judge erred in denying its motion for a directed verdict and in giving each of the quoted instructions. The circuit court of appeals af-

firmed. 90 F. (2d) 817. This Court granted a writ of certiorari. — U. S. —. There are presented for decision, questions whether the trial court erred in refusing to direct a verdict for defendant or in giving any of the instructions quoted above.

The circuit court of appeals has twice held the evidence sufficient to sustain a verdict for plaintiff. It found that the facts brought forward at the second trial are not substantially different from those presented on the first appeal. There is no substantial controversy as to the principal evidentiary circumstances upon which depends decision of the controlling issue, whether the death of the insured was accidental. As we are of opinion that the trial court erred in giving the challenged instructions, and the judgment is to be reversed and the case remanded to the district court where another trial may be had, we refrain from discussion of the evidence. We find it sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction.

The form and substance of the challenged instructions suggest that the trial judge followed those brought before this Court in *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661. The opinion of the circuit court of appeals reads that case to require approval of the instructions here in question. As it has not been uniformly interpreted, we shall examine its principal features. There the accident policy sued on covered bodily injuries effected through external, violent and accidental means when such injuries alone occasioned death or disability. A proviso declared that no claim should be made under the policy when the death or injury had been caused by suicide, or by intentional injuries inflicted by the insured or by any other person. The complaint alleged that the insured had been accidently shot by a person or persons unknown to plaintiff, by reason of which he instantly died. The answer denied that death was occasioned by bodily injuries effected through external, violent and accidental means, and alleged that it was caused by suicide, or by intentional injuries inflicted either by the insured or by some other person.

The statement of the case quotes the following instructions:

"The plaintiff . . . gives evidence of the fact that the insured was found dead . . . from a pistol shot through the heart. This evidence satisfies the terms of the policy with respect to the fact that the assured came to his death by 'external and vio-

lent means,' and the only question is whether the means by which he came to his death were also 'accidental.'

"It is manifest that self-destruction cannot be presumed . . . The plaintiff is therefore entitled to recover unless the defendant has by competent evidence overcome this presumption and satisfied the jury by a preponderance of evidence that the injuries which caused the death of the insured were intentional on his part.

"Neither is murder to be presumed . . . but if the jury find . . . . that the insured was in fact murdered, the death was an accident as to him . . . . If . . . . the injuries of the insured . . . were not intentional on his part the plaintiff has a right to recover . . . . The inquiry . . . is resolved into a question of suicide, because if the insured was murdered the destruction of his life was not intentional on his part.

"The defendant, in its answer, alleges that the death of the insured was caused by suicide. The burden of proving this allegation by a preponderance of evidence rests on the defendant."

This Court held that the trial judge erred in charging that if the insured was murdered plaintiff was entitled to recover and on that ground reversed the judgment and remanded the case with directions to grant a new trial.

It was not necessary to consider any other question. But, for guidance of the trial ordered, the Court discussed other parts of the charge.

At the outset the opinion declares that under the issue presented by the general denial it was incumbent on plaintiff to show that the death was the result not only of external and violent, but also of accidental means. It states that the two "principal facts to be established were external violence and accidental means, producing death. The first was established when it appeared that the death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive . . . Were the means by which the insured came to his death also accidental? If he committed suicide, then the law was for the company, because the policy . . . did not extend to . . . self-destruction. . . ."

The opinion proceeds (p. 667): "Did the court err in saying to the jury that upon the issue as to suicide the law was for the plaintiff unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition

that direct and positive proof must be made of death having been caused by external, violent and accidental means did not deprive the plaintiffs, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts."

The statement just quoted, lacking somewhat of the precision generally found in opinions of the Court prepared by its eminent author, has been variously construed. The question it propounds does not fully reflect the substance of the charge which put on the defendant the burden of proving suicide by preponderance of the evidence. However, the opinion shows that the burden was on plaintiff to prove death by accident as defined in the contract. It contains nothing to suggest that the court deemed the issue as to burden of proof arising on general denial to be affected by defendant's allegation of suicide. It held that if the insured committed suicide, plaintiff had no claim; that, from the fact of death by violence, accident would be presumed, and that unless the presumption was overcome by evidence the law was for plaintiff. The opinion does not indicate the quantum of proof required to put an end to the presumption. It is consistent with, if indeed it does not support, the rule that the presumption is not evidence and ceases upon the introduction of substantial proof to the contrary. Thayer, Preliminary Treatise on Evidence, p. 346. *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639, 642, 644. *Heiner* v. *Donnan,* 285 U. S. 312, 329. *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 506. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286. *Nichols* v. *New York Life Ins. Co.,* 88 Mont. 132, 139 *et seq.* The opinion did not definitely sustain any of the charges to which it referred. It falls far short of sustaining the instructions challenged in the present case.

Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. The burden was on plaintiff to allege and by a preponderance of the evidence to prove that fact. The complaint alleged accident and negatived self-destruction. The answer denied accident and alleged suicide. Plaintiff's negation of self-destruction taken with defendant's allegation of suicide served to narrow the possible field of controversy. Only the issue of accidental death *vel non* remained. The question of fact to be tried was precisely the same as if plaintiff merely alleged accidental death and defendant inter-

posed denial without more. *Travellers' Ins. Co.* v. *Wilkes*, 76 F. (2d) 701, 705. *Fidelity & Casualty Co. of New York* v. *Driver*, 79 F. (2d) 713, 714. Cf. *Home Benefit Association* v. *Sargent*, 142 U. S. 691.

Upon the fact of violent death without more, the presumption, i. e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. *Travellers' Ins. Co.* v. *McConkey, supra*, 665. It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence. *Despiau* v. *United States Casualty Co.*, 89 F. (2d) 43, 44. *Jefferson Standard Life Ins. Co.* v. *Clemmer*, 79 F. (2d) 724, 730. *Travellers' Ins. Co.* v. *Wilkes, supra*, 705. *Fidelity & Casualty Co. of New York* v. *Driver, supra*, 714. *Frankel* v. *New York Life Ins. Co.*, 51 F. (2d) 933, 935. *Ocean Accident & Guarantee Corp.* v. *Schachner*, 70 F. (2d) 28, 31. But see: *New York Life Ins. Co.* v. *Ross*, 30 F. (2d) 80. *Tschudi* v. *Metropolitan Life Ins. Co.*, 72 F. (2d) 306, 308, 310. *Nichols* v. *New York Life Ins. Co., supra.*

In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties.

The challenged instructions cannot be sustained.

Judgment reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 323—October Term, 1937.

New York Life Insurance Company, Petitioner, *vs.* Stella Jane Gamer, as Executrix of the Will of E. Walter Gamer, also known as Edward W. Gamer, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 14, 1938.]

Mr. Justice Black, dissenting.

The judgment below rests upon an insurance policy contract made in Butte, Montana. Plaintiff filed suit for more than $3,000 in a Montana state court, and the insurance company—because it was not a Montana corporation—was able to remove the suit to the Federal District Court. Plaintiff's judgment in the District Court was affirmed by the Court of Appeals. This Court now reverses plaintiff's judgment because the District Court instructed the jury that—evidence having established the death of the insured by violent and external means—the law presumed from these facts that the death "was not voluntary and . . . . the defendant must overcome this presumption and satisfy the jury by a preponderance of the evidence, that his death was voluntary. . . ." The policy of insurance was a Montana contract and even though the company was able to remove plaintiff's case to a Federal court, I believe the plaintiff's rights should be determined by Montana law. Under Montana law I believe the above instructions were proper.

The Supreme Court of Montana has said:[1]

"Where, as here, death is shown as the result of *external and violent means* and the issue is whether it was due to accident or suicide, the *presumption is in favor of accident.*"

The majority agree with the Montana law up to this point, saying:

"Upon the fact of *violent death without more, the presumption,* i. e., the applicable rule of law, *required the inference of death by accident rather than by suicide.*"

[1] Nichols *v.* New York Life Ins. Co., 88 Mont. 132, 140.

At this point, agreement ends between the rule here declared by the majority and the law of Montana.

Under Montana law the presumption that violent death was accidental and not suicidal continues and does not disappear unless the evidence "*all* points to suicide . . . with such certainty as to preclude any other reasonable hypothesis"; and the presumption continues for the jury's consideration except " . . . when the evidence points overwhelmingly to suicide as the cause of death."[2]

Contrary to this clear statement by the Montana Supreme Court is the different rule clearly announced by the majority here in holding that the presumption disappears after the insurance company introduced evidence merely "*sufficient to sustain* a finding that the death was not due to accident."

This Court does not find that the evidence in this case excludes every other reasonable hypothesis but suicide or that all of the evidence points "unerringly to suicide as the cause of death."[3] On the contrary the majority opinion states:

"We find it (the evidence) sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction."

---

[2] Nichols *v.* New York Life Ins. Co., *supra*, at 141. In a case involving an action on an insurance policy, in which the *McConkey* case, *supra*, was followed, the Supreme Court of Montana said:

"'The testimony as to the incidents connected with the death of the insured is slight, but is sufficient to establish the death of insured by external and violent means. . . .

" . . . . if plaintiff had 'shown by the fair weight of the evidence that the assured came to his death as the result of a pistol shot . . . , then the law will presume that the shot was accidental, and that it was not inflicted with murderous or suicidal intent. And under such circumstances the burden will be upon the defendant to overcome this presumption, and to show that the death was not caused by accidental means.'

"It is apparent, therefore, that under the great weight of authority plaintiff's evidence made a *prima facie* case. As said by this court in numerous decisions, when a *prima facie* case is made by plaintiff, the defendant must rebut the case so made, or fail in the action." Withers *v.* Pacific Mutual Life Insurance Co., 58 Mont. 485, 491, 492, 493, 494.

"Testimony constituting a mere contradiction of the facts established presumptively by the *prima facie* case does not necessarily suffice to overthrow the same. . . . the *prima facie* case must not only be contradicted but overcome as well. When such case is made, contradictory testimony merely amounts to a conflict in the evidence, with the ultimate facts to be determined by the court or jury, as the case may be." State *v.* Nielsen, 57 Mont. 137, 143. Cf. Johnson *v.* Chi. Ry. Co., 52 Mont. 73. See, Renland *v.* First Nat. Bank et al., 90 Mont. 424, 437.

[3] Cf. Nichols *v.* New York Life Ins. Co., *supra*, at 144.

It is obvious that the majority here declare a rule based neither on Montana law nor Federal statute. This Federal judicial rule must none the less be followed in suits on insurance policies tried in Federal courts. The result is that suits on policies for less than $3,000 tried in state courts will frequently be decided by rules different from the rule which governs similar suits tried in Federal courts because they involve more than $3,000. In an orderly and consistent system of jurisprudence, it is important that the same law should fix and control the right of recovery on substantially identical contracts made in the same jurisdiction and under the same circumstances. Neither the company nor the policy holder should obtain an advantage by the application of a different law governing the contract merely because the case can be removed to a Federal court.

It was to avoid such results—among other reasons—that Section 725, U. S. C., Title 28, was passed. It provides:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In this case, the law determining the burden of proof as to suicide affects the substantial rights of the parties.[4] Substantial rights arising from an insurance contract are governed by the law of the state where the contract is made.[5] Since the court below instructed the jury in accordance with the law of Montana, I do not believe the charge constituted reversible error.

Nor can I agree that we should approve a general rule governing trials in Federal courts which in my judgment transfers *jury functions* to judges. The effect of the decision here is to give the trial judge the right to decide *when sufficient evidence has been introduced to take from the jury* the right to find accidental death from proof of death by violent and external means. This inevitably follows if the presumption, or right of the jury to infer death by accident, "disappears" whenever the judge believes sufficient evidence of suicide has been introduced.

Stripped of discussions of legal formulas designated as "presumptions" and "burden of proof", the net result of the rule of "disappearing presumptions" is that trial judges in Federal courts

[4] Cf. Central Vermont Railway Co. v. White, 238 U. S. 507, 511, 512; New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371, 372.

[5] Pritchard v. Norton, 106 U. S. 124, 130; Northwestern Life Insurance Co. v. McCue, 223 U. S. 234, 246, 247.

(irrespective of state rules) have the power to determine when sufficient "substantial evidence" has been produced to justify taking from the jury the right to render a verdict on evidence which—had the judge not found it overcome by contradictory evidence—would have justified a verdict. The judge exercises this power as a "trier of fact" although evidence, previously introduced and sufficient to support a verdict, has neither been excluded nor withdrawn.

Proof of death by external and violent means has uniformly been held to establish death by accident. The extreme improbability of suicide is complete justification for a finding of death from accident under these circumstances. While it has been said that this *proof of accidental death* was based on "presumption", in reality —whatever words or formulas are used—what is meant is that a litigant has offered adequate evidence to establish accidental death. To attribute this *adequacy of proof* to a "presumption" does not authorize or empower the judge to say that this "adequate proof" (identical with legal "presumption") has "disappeared". If the evidence offered by plaintiff provides adequate proof of accidental death upon which a jury's verdict can be sustained, mere *contradictory* evidence cannot overcome the original "adequate proof" unless the authority having the constitutional power to weigh the evidence and decide the facts believes the contradictory evidence has overcome the original proof. The *jury* —not the *judge* —should decide when there has been "substantial" evidence which overcomes the previous adequate proof. Here, this Court holds that at the conclusion of plaintiff's evidence the jury had adequate proof upon which to find accidental death, and which would authorize a verdict that insured died as a result of accident, but also holds that, after subsequent contradictory evidence of defendant, the judge (not the jury) could decide that plaintiff's adequate proof (presumption) had "disappeared" or had been overcome by this subsequent contradictory testimony. This took from the jury the right to decide the weight and effect of this subsequent contradictory evidence. Such a rule gives parties a *trial by judge,* but does not preserve, in its entirety, that *trial by jury* guaranteed by the Seventh Amendment to the Constitution. I cannot agree to a conclusion which, I believe, takes away any part of the constitutional right to have a jury pass upon the weight of *all of the facts* introduced in evidence.

I believe the judgment of the court below should be affirmed.